

United States
Circuit Court of Appeals
For the Ninth Circuit. ✓

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, a corporation,
owner of THE SS "PENNSYLVANIAN", her engines, boilers, etc.,
Appellant,

vs.

WESTERN TRANSPORTATION CO., a corporation, owner of the
Steamboat "BARRY K", etc., and Barges 22 and 24,
Appellee,

And

WESTERN TRANSPORTATION CO., a corporation, owner of the
Steamboat "BARRY K", etc., and Barges 22 and 24,
Appellant,

vs.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, a corporation,
owner of THE SS "PENNSYLVANIAN", her engines, boilers, etc.,
Appellee.

Apostles on Appeal

In Two Volumes

VOLUME II

Pages 463 to 904

Upon Appeal from the District Court of the United States
for the District of Oregon

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JOHN NORBERG,

produced as a witness in behalf of the Respondents,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Wood:

Q. Captain Norberg, you were the pilot of the
Pennsylvanian on the night of this collision, weren't
you? A. Yes, sir.

Q. Where do you live, Captain?

A. Oak Grove, Oregon.

Q. You are a local resident here? A. Yes.

Q. What pilot licenses do you hold?

A. I have got a pilot license for San Francisco,
San Pedro, San Diego, Humboldt Bay, Coos Bay,
Columbia Bar at Astoria, Willapa Harbor, Grays
Harbor, Puget Sound and adjacent territory, be-
tween Astoria and Vancouver, Washington, and
Portland, Oregon.

Q. And what department are those licenses is-
sued by? A. The Steamboat Inspectors.

Q. Of the United States Government? [392]

A. Yes, sir, federal license.

Q. Federal license. What has been your experi-
ence at sea, in the rivers; how long have you been
in this business?

A. I have been piloting in the rivers about six
years.

Q. In the Columbia and Willamette Rivers?

A. Yes.

Q. And before that what has been the nature of
your sea experience?

(Testimony of John Norberg.)

A. Thirty-seven years as Master.

Q. Of what kind of vessels?

A. Oh, ocean-going vessels.

Q. Ocean-going vessels. Are you a member of this so-called Columbia River Pilots' Association?

A. No.

Q. You are known as an independent pilot, are you?

A. Yes.

Q. That means not a member of their association?

A. Yes.

Q. And is your employment that of piloting ships generally of all companies or are you employed by one company?

A. One company.

Q. What company is that?

A. American-Hawaiian.

Q. You are employed to pilot their vessels exclusively, are you?

A. Yes, sir.

Q. How long have you been employed by them to do that work? [393]

A. Pretty near thirteen years.

Q. Have you been doing that work for them here on the river for the last five or six years?

A. No, about three years and four months.

Q. Are you still doing that work for them?

A. Yes.

Q. You are in their employ now?

A. Yes.

Q. You were the pilot of the Pennsylvanian in navigating her or handling her as pilot on the night of this collision, were you?

A. What?

(Testimony of John Norberg.)

Q. You were the pilot of the Pennsylvanian on the night of the collision? A. Yes, sir.

Q. Where were you on the ship?

A. On the bridge.

Q. And what officers of the ship were on the bridge with you?

A. The Captain of the ship, Captain Vaux, the third officer Nelson.

Q. Third Officer Nelson? A. Yes.

Q. And who was directing the course of the ship? A. I was.

Q. What was Captain Vaux doing?

A. Captain Vaux, he was assisting me and keeping a lookout.

Q. And what was Third Officer Nelson doing?

A. He was also keeping a lookout and tending to the telegraph. [394]

The Court: Will you identify those to me now?

Mr. Wood: Yes, your Honor. Captain Vaux, will you stand up? He is the Master of the ship; and Third Officer Nelson. Those are the two that flew up from San Francisco.

Q. Now, Captain, I don't mean the precise minute when I ask you these times, but about when did you leave Portland to go down the river?

A. I left Portland, I think, three minutes past twelve, midnight.

Q. And where were you bound for?

A. Astoria.

Q. And how was the ship loaded; what was her draft?

(Testimony of John Norberg.)

A. She was partly loaded, drew 19 feet and 2 inches, I believe, deepest draft.

Q. That was astern, was it, aft? A. Yes.

Q. Do you know what her draft was forward?

A. 15 feet, I believe.

The Court: What did she draw fully loaded?

Mr. Wood: I think I better ask Captain Vaux that. Would you like to know that now, your Honor? Captain Vaux, will you please stand up and be sworn.

(Whereupon Earle B. Vaux was sworn.)

Mr. Wood: Captain Vaux, what would the Pennsylvanian draw fully loaded?

Mr. Vaux: According to the season, that is, the summer draft [395] was 29.07 deep; that is a mean. Her mean draft would be 29.07. Tropical would be 30 feet and 1 inch, and she would have a winter draft of 29 feet. It is a seasonal draft.

Mr. Wood: I understand the law and the regulations prescribe different freeboards in summer and winter. Thank you, Captain.

Q. You can now describe, please, for the Court, the course of the vessel as you left Portland and proceeded down the river, passed under the bridges and so on, tell what happened.

A. We started down river, slow speed, half speed——

A. A little louder, please; speak to the Court but speak loud.

A. Yes. We went through the St. Johns Bridge, proceeded down towards Post Office range under

(Testimony of John Norberg.)

slow speed and half speed, just according to how fast and how slow we was going. Down at Post Office range and just coming up the range there was a boat coming up-river——

Mr. Young: If the Court please, I really can't hear the witness.

Mr. Wood: Step up closer.

The Witness: I will talk a little louder.

Mr. Young: Please.

The Witness: Yes.

A. (Continuing) Saw a tug coming up the river as we were coming off the range.

Q. As you were coming off the range?

A. Yes. We was favoring the east side of the channel. [396]

Q. I didn't hear that last.

A. We was favoring the east side of the channel.

Q. You were favoring the east side?

A. Yes. Or the right side. Then we got one blast of the whistle from the tug, which was answered by the Pennsylvanian, one blast. The tug was then showing a red light.

The Court: Q. Who answered it, you?

A. Beg pardon?

Mr. Wood: Q. Who blew the whistle on the Pennsylvanian? A. I did.

Q. The tug at that time was showing her red light?

A. Showing the red light. And slowed down,

(Testimony of John Norberg.)

half speed; then we got the danger signal from the tug, a group of short blasts and couldn't tell how many it was, they was coming too fast, too close together. Then we stopped and we got another group of signals and I ordered full astern. By that time the tug had passed our bow and came up on the other side and turned his green light to us, against our red.

Q. Now, the red light was on which side of the vessel?

A. The red light is on the port side.

Q. Then green light is on the starboard?

A. Yes. We was then going full astern, or at least the Pennsylvanian was going full astern and there was another group of whistles—I should mention that when I ordered the engines full astern I gave three blasts of the whistle. [397]

Q. The law requires that, doesn't it? What does that indicate?

A. Full astern.

Q. Three blasts of the whistle is the law, the legal signal. "My engines are going full speed astern," is it not?

A. Yes, when the vessel is under way.

Q. All right. Go ahead.

A. Yes. Then the last group of signals we got we was getting pretty close together and the Pennsylvanian was swinging away towards the bank and the other one came almost at a right angle in front of the Pennsylvanian's bow. The tug was well off on the side. Then I noticed that the tug

(Testimony of John Norberg.)

had two barges—or one barge I could see, the reflection of our mast headlight shown down on the barge, could see just the first indication that I had that that tug was pushing a barge.

Q. Ahead of her?

A. Ahead of her. About that time we was very close together and the collision took place. I should judge about thirty feet or so in on the barge from the stem of the Barry “K”.

Q. You hit the starboard side of the barge?

A. Hit the starboard side of the barge.

Q. About 30 feet ahead of the stem of the Barry “K”?

A. Yes.

Q. Captain, I think I will ask you to mark on the chart some locations.

Mr. Young: If the Court please, may I suggest that if there [398] is available a blue pencil, that any marks put on there by this witness should be in blue?

Mr. Wood: We will use a blue——

Mr. Young: Very well.

Mr. Wood: Q. On Libelant’s Exhibit 2, the chart of the river, will you first point to the location of the Pennsylvanian as near as you can when you first sighted the Barry “K”?

A. It was pretty close to here somewheres.

Q. All right. Coming off the range there, you say?

A. Coming off the range.

Q. About where I am marking?

A. Just about.

(Testimony of John Norberg.)

Q. I mark that with a blue cross. I have marked that with a cross and a line drawn from it and indicated, "Pennsylvanian, Norberg, first saw Barry 'K'." Now, about how far down the river was the Barry "K" from you at that time?

A. Less than a mile, I should judge.

Q. Will you indicate about where you think she was at that time?

A. Just about off here somewheres, close to that other mark, pretty close.

Q. Well, I put a blue cross right beside the red cross that Captain Reed used to indicate the Barry "K" when he first saw you. Now, can you please indicate on there where the collision took place as nearly as you can tell?

A. Well, that is pretty close to the other mark here, too, as [399] near as I can judge; it might be maybe a hundred feet, just about there.

Q. You just don't differ much then from Captain Reed as to where the collision took place?

A. No.

Q. That is where you said, where I made the mark?

A. Yes, just about.

Q. Where I put the blue cross alongside the red cross that Captain Reed used?

A. Yes. Pretty close.

Q. Will you take the stand again, please? Now, in my questions to you just now I referred to when you first saw the Barry "K". Well, what did you see, actually what did you see, to indi-

(Testimony of John Norberg.)

cate there was a tug and tow down the river ahead of you when you first saw her?

A. She had two mast lights and a red side light and brilliant deckhouse lights along the sides.

Q. Well, the deck lights—I mean those house lights are no part of her navigation lights, are they? A. Oh, no.

Q. And the red light indicated to you that her position was what, towards you, at that time?

A. She was coming up the stream across my bow.

Q. Showing her left side to you?

A. Yes. [400]

Q. And what do the two vertical lights mean that you saw? A. A tow boat light.

Q. That she had a tow?

A. Yes, she had a tow.

Q. But you did not at that time see any lights on the barges? A. No, sir.

Q. Did you at any time see any lights on the barges?

A. After the collision we had a search light on the barges, on one of them, swung around, and Captain Vaux drewed my attention to it, a little lantern that sat on the corner of a barge and evidently that was the end of the barge that was next to the stem of the Barry "K"?

Q. In other words, you saw a little lantern on the rear starboard corner of the barge; is that right?

(Testimony of John Norberg.)

A. I think it was on the port, yes.

Q. What was it, a kerosene lantern?

A. Just a small, what they call a construction lantern; you know, that they use for finding the way in boarding ship or——

Q. Like this? A. No, sir.

Q. How did it differ from this?

A. Oh, it was a higher lantern that you pull up the slide, you know, and take the globe out.

Q. Oh, that kind?

A. Yes, like they use for construction work. Well, they put them [401] on piles of sand and anything like that, you know.

Q. And how brightly was it burning?

A. Well, we had to use a search light to find it.

The Court: He means on piles to warn that there is construction there. I thought he said a minute ago that they used on board ship.

Mr. Wood: Q. What did you mean, Captain, when you used the phrase that they use them on construction?

A. Well, I have seen those lights, you know, when they pile up a sand pile or wood pile or anything like that, they put them on there as a warning.

Q. An ordinary kerosene lantern, is that what you mean? A. Yes.

Mr. Young: If the Court please, the record shows, I presume, that the lantern which counsel is exhibiting to the witness is the one that has

(Testimony of John Norberg.)

already been identified and in evidence as Libelant's Exhibit 8?

Mr. Wood: That is right.

Q. Now, Captain Norberg, I forgot to ask you to describe the conditions of the night. Will you do that? What kind of a night was it?

A. It was dark——

The Court: Q. What is your age, Captain?

A. Beg pardon?

Q. What is your age? [402]

Mr. Wood: Q. Age; how old are you?

A. Sixty-five.

Q. Where were you born? A. Sweden.

Q. Now, what kind of a night was it, Captain?

A. It was calm, dark, and quite dark, and there was no wind; it was just the light air, small out-going current.

Q. Smooth out-going current?

A. Small; half a knot or so.

Q. Half a knot or so?

A. Yes. Between half a knot to a knot, I should judge.

Mr. Young: Could you speak just a little louder, Captain, please?

Mr. Wood: Q. How was the visibility?

A. The visibility was good.

Q. Was it clear overhead or overcast?

A. Overcast.

Q. And you say it was calm, no wind?

(Testimony of John Norberg.)

A. No wind.

Q. How was the water?

A. The water was smooth.

Q. Was there any condition present which made it difficult to navigate that channel?

A. No, sir.

Q. When you received this one blast from the Barry "K", was that [403] soon after you first saw each other?

A. Shortly after.

Q. Could you give us an idea about how far apart the ships were then?

A. I should judge about three-quarters of a mile.

Q. Was she still showing you her red light?

A. Yes, sir.

Q. How did she appear off your bow, dead ahead or starboard or port?

A. She was coming across my bow when she blowed that first signal; she was about dead ahead and then she was coming farther up the channel and naturally she got on my port side then.

Q. Yes. And when you received the first blast from the Barry "K", did you confirm it in any way by conversation with your other navigating officers?

A. There is always a rule to ask men that is on a bridge what signal that was.

Q. Is that a regular standing rule?

A. That is the customary rule on an American-Hawaiian ship.

(Testimony of John Norberg.)

Q. What did you do; did you follow that rule?

A. Yes, sir.

Q. What did you do?

A. I asked the Captain, I says, "Was that one blast?" The Captain said, "Yes." I also asked the Third Officer, "Did you hear that there was one blast?" "Yes," he said. [404]

Q. Did you ask them those questions because you had any doubt in your own mind as to what you heard? A. No.

Q. You were following the routine practice?

A. Yes, sir.

Q. And after they had confirmed the whistle to you in that manner, is that when you answered? When did you answer that one blast?

A. Oh, about half a minute, less than that; ten seconds after I heard the blast, after we had conferred.

Q. After you had conferred? A. Yes.

Q. Now, when you answered that one blast, did you get an immediate response from the Barry "K"? A. No, not right away.

Q. But sometime later you got what?

A. I got a group of blasts.

Q. And what did you do then?

A. I slowed down.

Q. And then what?

A. And held my course along the land there and stopped.

Q. What do you mean by along the land?

(Testimony of John Norberg.)

A. For the right side of the channel.

Q. Now, you say that sometime between the time you have been talking about and the collision the Barry "K" swung around and [405] showed her green light?

A. Yes, sir.

Q. What did that indicate to you?

A. That she was coming around over towards me again.

Q. How far away was she then, do you think?

A. Oh, I should judge about twelve or fifteen hundred feet, approximately.

Q. Was that sufficient space for her to resume her course and pass to port if she wanted to?

A. Yes, sir.

Q. What was the supposition in your mind when you saw that green light twelve hundred feet away?

A. She might have got out of control and taken a sheer.

Q. Took a sheer? A. Yes.

Q. What does a sheer mean?

A. Swing off the regular course either way.

Q. Vessels do that sometimes, do they?

A. Oh, yes.

The Court: That is when he saw the green light?

Mr. Wood: Yes.

Q. What did you expect her to do?

A. Swing back again onto her course.

Q. And pass you port to port?

A. Yes, sir. [406]

Q. How close were you to her when you were

(Testimony of John Norberg.)

forced to the conclusion she was not going to swing back on her course but that there was some danger of collision?

A. About 800 feet or more perhaps.

Q. Then what did you do?

A. Full astern.

Q. What did you do with your rudder?

A. Hard right.

Q. Now, when you back full speed astern an ocean-going steamer of the type of the Pennsylvanian, what effect does that reversing motion of her propeller have on the swinging of the ship?

A. Swing to the right.

Q. Which end of the ship swings to the right?

A. The bow.

Q. And the stern swings to the left?

A. Yes, sir.

Q. It is often referred to as backing to port, isn't it?

A. That is right.

Q. And that means that the stern backs to port?

A. Yes, sir.

Q. Do you know whether that took place with the Pennsylvanian; in other words, was your backing long enough in time to have that effect on the Pennsylvanian, or not?

A. Oh, yes.

The Court: Have him explain the hard right rudder. [407]

Mr. Wood: Q. Will you explain what a hard right rudder is?

A. Swing to the right; that is right rudder, and to the left is left rudder.

(Testimony of John Norberg.)

Q. In which direction will a hard right rudder send your ship in?

A. Turn to the right.

The Court: Q. On the backing maneuver, just tell why you gave the hard right rudder order.

A. To get away from the vessel that is coming on your port side, to get away from the vessel that is closing in on you.

Q. In other words, it added to the natural result of your backing, threw your bow to the right more?

A. Yes. All single-screw, right-handed ships handle that way.

Mr. Wood: Q. You mean a screw that turns——

A. Propeller.

Q. The propeller that turns clockwise?

A. Yes.

Q. That is what you call a right-handed screw, is it?

A. Yes.

Q. Captain, I suppose you have passed steamers in that channel many times, have you?

A. Yes, hundreds of times.

Q. Big ocean steamers?

A. Yes.

Q. How do they pass? [408]

A. Port to port.

Q. Do you know the approximate width of that channel?

A. 800 feet.

Q. Of deep water?

A. Of good deep water.

Q. What would you say as to that channel being

(Testimony of John Norberg.)

wide enough for craft to pass safely port to port; is there enough room there?

A. Yes, plenty of room; plenty.

Q. Is there any reason why it is not safe or practicable for tow boats there to pass port to port?

A. I can't see no reason why they couldn't.

Q. Do you know about how high the bow of the Pennsylvanian was out of the water, how much freeboard she had forward, or do you know?

A. No, I couldn't—I don't go into that enough. I pilot the ship.

Q. What happened after the collision; what did you do then?

A. Well, we stayed around and inquired of the Barry "K" if they needed any assistance. She went over across to the other side and made fast, I believe, to Silo Dolphin there, some pilings along the dike there on the west side, and we was figuring out to send for some tugs, you know, to take care of the barges. She was going to stay there until we got a tug and was going to send in a wire to American-Hawaiian. About fifteen minutes or so later a tug came along—— [409]

Q. You mean the tug Cruiser?

A. Cruiser. And went over to the Barry "K". We asked him to go over there and he went over to the Barry "K" and he came back and we asked him if the Barry "K" was heavily injured and he said, "No,"—if anybody was hurt on board the Barry "K"; "No." We asked him if he would

(Testimony of John Norberg.)

take care of the tug, at least take care of the barges. He says, "Yes," he could handle them. We says, "If you can't, we will try to help you." He says, "No, I can handle them."

Q. Were the helm orders that you gave on the bridge of the Pennsylvanian properly carried out in all respects to your satisfaction? A. Yes.

Q. There was no question of helm orders being wrong or not carried out? A. No.

Q. Did you have a lookout? A. Yes.

Q. Where was he stationed?

A. In the eyes of the ship.

Q. In the eyes of the ship?

That phrase means up in the forecastle head, doesn't it? A. Right forward.

Q. Forward? A. Yes. [410]

Q. Were your engine orders carried out?

A. Yes, sir.

Q. The system on vessels is for what you call the telegraph to signal your engine signal to the engine room and then they repeat it back on the same instrument, do they not? A. Yes, sir.

Q. Which tells you that your order has been heard?

A. Yes, sir. Besides that we got the indicator that shows when the engines back and go ahead, red and white lights.

Q. Do you know then that your engine orders were properly carried out? A. Yes.

Mr. Wood: Have you the log there, Captain?

(Testimony of John Norberg.)

Mr. Vaux: Yes, I have. Which one do you wish?

Mr. Wood: The bridge log.

Q. Captain, after you came down through the St. Johns Bridge, I don't know whether you remember without referring to the bell books just exactly what your speeds were, do you?

A. Sometimes slow and sometimes half. Went by any vessel, slow down; if a vessel was laying along the docks, slow down going past Terminal 4.

Q. Well, after you passed through the St. Johns Bridge, can you tell us what your speed was or should we refer to the books on that?

A. You mean the engine room's bells or speed of the vessel? [411]

Q. Yes. I don't know whether you remember just what your speed was or not.

A. No. You get so many ships that way that I couldn't remember.

Q. What is your best recollection of what speed you were making as you approached the Barry "K"?

A. About seven, eight knots. Perhaps less.

Q. What is your custom, by the way, and your practice if you are passing close enough to a tow to endanger her lines at all, what do you do?

A. Slow down.

Q. Is that regular?

A. That is the unwritten law.

Q. Do you observe it? A. Yes, sir.

Q. Have you any idea what your speed was at the moment of impact?

(Testimony of John Norberg.)

A. Oh, about one or two knots, perhaps.

Mr. Wood: You may cross examine.

Cross Examination

By Mr. Young:

Q. I believe, Captain, you testified that you have had somewhere around six years of experience in the Willamette and Columbia rivers?

A. Yes.

Q. And prior to that time your experience has been confined to [412] places other than this territory; is that right? A. Yes.

Q. Most of it, however, had been on the high seas, had it not? A. No.

Q. Not? A. No.

Q. How much of it had been on the high seas?

A. Oh, about eight or ten years—ten years.

Q. And was that the eight or ten years before you came to the Columbia River? A. Yes.

Q. There is quite a bit of difference between the operation or piloting of vessels on the high seas and piloting them in the river channels, is there not?

A. No.

Q. No difference?

A. We use the same rules.

Q. However, your passages are much closer in the rivers, are they not, than on the high seas?

A. Well, they got more room on the high seas.

Q. That is what I mean. The great wide open spaces are out there that don't exist on the rivers; isn't that true?

(Testimony of John Norberg.)

A. We use the same rules, the same law.

Q. The same law, but, nevertheless, there is a lot more room to maneuver, isn't there? [413]

A. Yes.

Q. Now, Captain, when you came into the work in the Columbia and Willamette rivers, did you at any time have any experience in the operation of river boats? A. No.

Q. Your experience in the Willamette and Columbia rivers has been confined to the operation and piloting of ocean-going vessels; is that right?

A. Yes.

Q. And for the last three or four years you have worked only for the American-Hawaiian?

A. Yes.

Q. Did you work for any other company in the Willamette or Columbia rivers prior to the time that you came over to the American-Hawaiian?

A. Luckenbach.

Q. And did you work exclusively for them at that time? A. Yes, sir.

Q. Any other company? A. No.

Q. Then you have worked for only two companies which operate vessels in the Willamette and Columbia rivers? A. Yes.

Q. And those were all ocean-going vessels?

A. Yes. [414]

Q. You were not in this territory, I take it, at the time that American-Hawaiian had a collision down the Columbia River at Altoona between the Welsh Prince and the Iowan, were you?

(Testimony of John Norberg.)

A. I had just came up the Columbia River a couple of months—a month before that.

Q. A month before that?

A. In one of the Luckenbach ships.

Q. How soon after that accident did you go to work for the American-Hawaiian?

A. About six years.

Q. Six years later? A. Yes.

Q. Did you know that the American-Hawaiian stopped operating its ocean-going vessels in the Willamette and Columbia rivers in the nighttime following that accident, for many years?

A. Sure; I worked for them when we was doing that.

Q. You knew that to be the fact?

A. Yes.

Q. How recently is it that the American-Hawaiian has resumed the operation of its ocean-going vessels in the Willamette and Columbia rivers at nighttime?

A. Well, it is about—less than two years, I think.

Q. Less than two years?

A. Isn't that so? Yes, less than two years.

Q. You mean two years dating back from now or the accident? [415] A. From now.

Q. Dating back from now?

A. From now.

Q. Yes. Then prior to that two-year period and subsequent to the time of the Welsh Prince accident, the American-Hawaiian was not operating

(Testimony of John Norberg.)

its vessels in the rivers in the nighttime; am I correct about that? A. Yes, you are correct.

Q. How much of the time have you had experience in piloting vessels in the Willamette and Columbia rivers at night?

A. Oh, about five years.

Q. How frequently during, say, the past five years have you had occasion to go down past Post Office Bar in the nighttime?

A. When I was with Luckenbach there was a couple of times a week, three times, perhaps.

Q. The hazards of navigation are somewhat greater in the narrow channels here at night than they are in the daytime, are they not?

A. No, not if they comply with the rules.

Q. Not if they comply with the rules?

A. Yes.

Q. Why, then, did the American-Hawaiian stop operating its vessels for a number of years?

Mr. Wood: It seems to me that is a matter of company policy.

A. I don't know. [416]

Mr. Young: The witness says he doesn't know the answer, so that is sufficient for that.

Q. Captain, you have testified that the time that the accident with the Barry "K" occurred that the draft of the Pennsylvanian was 19 feet 2 inches astern and about 15 feet forward?

A. Just about. I couldn't tell you exactly to the inch.

(Testimony of John Norberg.)

Q. Did you check those draft figures before you started out from Portland harbor with the Pennsylvanian that night?

A. I got it out of the log book.

Q. You got it out of the log book?

A. Yes.

Q. I mean, did you look into that matter when you started out from Portland harbor?

A. Sure.

Q. That is something that you wanted to know before you started piloting the vessel; is that correct? A. That is the way every pilot does.

Q. Now, have you ever piloted the Pennsylvanian prior to the time of the accident?

A. Lots of times.

Q. Lots of times? A. Yes.

Q. On those other occasions had she been fully loaded or only partly loaded?

A. Partly loaded. [417]

Q. Had you ever piloted her when she was fully loaded? A. Not in the river.

Q. Not in the river? A. No.

Q. Then did you know what her draft was when she was fully loaded?

A. 28 or 29 feet, I believe, according to the season of the year.

Q. What cargo was she carrying at the time of this accident; do you know? What was the nature of the cargo? A. General.

Q. Now, when you say she was partly loaded, to what extent was she loaded; do you know?

(Testimony of John Norberg.)

A. Well, she had anywheres from five or six hundred ton to maybe 3,000 ton.

Q. Do you know what her total cargo capacity was? A. No.

Q. You testified that at the time the accident happened there was on the bridge Captain Vaux, the Third Officer Nelson, and yourself; is that right? A. Right.

Q. Well, didn't you have a quartermaster, a watchman, on the bridge?

A. Sure, a quartermaster.

Q. The quartermaster was acting under your directions, was he not? A. Yes.

Q. With the windows on the bridge open that night?

A. I think they was closed; some of them was closed and some of [418] them open.

Q. Where were you personally stationed before this accident occurred?

A. From one end of the bridge to the other.

Q. That is, you mean you paced back and forth from one side to the other? A. Yes, sir.

Q. Is that bridge enclosed on the Pennsylvanian?

A. Well, it is enclosed but they got doors on each side. You go right through the bridge out to the flying bridge.

Q. Were you on the flying bridge?

A. Part of the time.

Q. Part of the time. What I mean is, in the

(Testimony of John Norberg.)

space where you were pacing back and forth, was there glass ahead of you, forward of you?

A. No, not outside.

Q. Not outside? A. No.

Q. Were you outside before the accident happened? A. Yes.

Q. Is that where you were at the time of the accident?

A. Just about outside at the time, because I was going from one side to the other and taking bearings.

Q. At the time that you heard the first whistle of the Barry "K", were you then outside? [419]

A. Yes, I was outside on the corner of the bridge.

Q. And who was nearest to you at that time?

A. Captain Vaux.

Q. How far away was he from you?

A. A couple of feet.

Q. And where was the watchman? Who was at the wheel; where is the wheel located?

A. It is inside.

Q. Inside the cabin?

A. Inside the pilot house.

Q. Inside the pilot house, yes. Was there any communication between you and the watchman at that point?

A. No, not at that point.

Q. If you wanted to give him an order from where you were then standing, could you do so?

A. I could just turn right around and tell him.

(Testimony of John Norberg.)

Q. Now, you testified that the first whistle you heard of the Barry "K" was one blast; is that right?

A. Yes.

Q. You have also mentioned that there is a practice on the American-Hawaiian vessels for the pilot to confer with the other men on the bridge as to the identity of a whistle; is that right?

A. Yes.

Q. How long has that practice been in existence?

[420]

A. As long as I have been there.

Q. As long as you have been with the American-Hawaiian?

A. Yes.

Q. Had you ever encountered that practice on any other ship that you ever piloted?

A. Well, I wouldn't say. I can't remember how the rules was with Luckenbach.

Q. You don't remember about that. How about any other vessels that you may have been piloting; was there any practice——

A. I didn't pilot any other vessels but the American-Hawaiian.

Q. Didn't you pilot vessels for the Luckenbach?

A. Yes, that is what I said.

Q. And you don't remember any such practice with them?

A. No.

Q. Before you were with the Luckenbach, did you pilot any other vessels for any other companies?

A. No.

Q. What sort of work were you doing then?

The Court: He means not on the river.

(Testimony of John Norberg.)

Mr. Young: Did you pilot vessels for other companies anywhere?

A. No, except for American-Hawaiian and Luckenbach.

Q. You mentioned that your licenses, however,——

A. That is the licenses in different ports.

Q. I mean in other ports or on the high seas.

[421]

A. Yes.

Q. Was there any company you ever worked for or for whom you piloted vessels where this practice of the pilot conferring with other members or conferring with anyone who was on the deck about the identity of the whistle of an approaching ship——

A. It is always a practice on all ships, especially in hazy weather and foggy weather when you hear that whistle, "Did you hear that whistle; in what direction?" and so on; then they commence to figure out where that whistle came from, and so on. That is a standard practice among the seafaring class.

Q. Is it not a fact, Captain, that the practice to which you refer is one that exists when there is some reason for you as pilot to doubt what the nature of that whistle may be?

A. No.

Q. That is not true?

A. No.

Q. Even though you in your own mind are perfectly convinced that you hear, say, one blast, nevertheless, as a matter of course, you check it with all the other men on the bridge; is that right?

(Testimony of John Norberg.)

A. Yes, sir.

Q. In other words, you always sort of go into a huddle with them to decide what the signal is?

A. No.

Q. You don't do that?

A. No, we always adhere to the whistles. [422]

Q. Captain, in your testimony before the Inspector, I will ask you whether you were asked this question by the Inspector and you gave this answer: "Question: Now, soon after sighting the vessel, did you hear a signal from her? Answer: Off the range and heading down I heard one blast of the whistle. Question: When you heard that one blast of the whistle, did the Third Mate mention it to you? Answer: Yes."

Now, who spoke first at that time; did the Mate speak to you and mention what the whistle was or did you speak to the Mate?

A. Well, I can't recollect that.

Q. Well, did you testify as I have indicated?

A. Yes, sir.

Q. Pardon?

A. I think I spoke first; I believe I did; I wouldn't be sure.

Q. And then continuing in response to the last question, did you give this further answer: "I asked the Captain, 'Was that one blast?' and he said, 'Yes'." Did you so testify? A. Yes.

Q. "And I said, 'Did you hear that?' and the Third Mate said, 'Yes, I heard one blast,' and I heard it myself"? A. Yes.

(Testimony of John Norberg.)

Q. Now, at that time, Captain, you did not say anything, did you, about this practice which existed on the American-Hawaiian vessels of your confering with other persons on the bridge, did you? [423]

A. I wasn't asked that question.

Q. I see. You didn't volunteer any information to that effect at least, did you? A. No.

Q. In the course of your experience in the operation of vessels down the Willamette River, how many times would you say you have been past Post Office Bar?

A. About seven or eight hundred times; a rough estimate.

Q. Now, at the place which you have marked on the map as being the point where the Pennsylvanian was when you first saw the Barry "K", immediately on your starboard side, what is the nature of the ground on the east shore? There is a bend there, isn't there, in the river?

A. A small turn, a small curve.

Q. There is a curve there?

A. Yes, a small curve.

Q. And there are trees over on that side, are there not? A. Yes, some trees there.

Q. Yes. Well, now, you saw the Barry "K" at the first time that there was any opportunity to see a vessel coming upstream in view of the existence of that bend, did you not? A. Yes.

Q. How is that? A. Beg pardon?

(The last question was read by the reporter.)

(Testimony of John Norberg.)

A. Yes, I did.

Q. In other words, prior to the time that you have testified that you did see the Barry "K", the existence of that bend would have prevented you from seeing it at any earlier time?

A. No, not that time of the year.

Q. Not that time of the year? A. No.

Q. What did you mean, then, when you said a moment ago that you did see her the first time?

A. I saw her—I understood you to say that I wouldn't see her; is that what you said?

Q. I asked you whether you, in view of the existence of the bend in the stream, saw the Barry "K" as soon as the bend would permit you to see her? A. Yes.

Q. That is right. You have testified that you were just about to go off Post Office range when you first saw the Barry "K"? A. I was going off.

Q. Just going off. Very well.

A. I was going off.

Q. How far would you say that you were up the range from, say, Post Office Bar Front light at the time that you went off the range?

A. Well, it was about——

Mr. Wood: Well, if the Court please, he has marked it on the [425] chart. I don't see how he could be any more accurate than that.

Mr. Young: This is cross examination, your Honor; he wasn't measuring it on the chart at the time of the accident.

(Testimony of John Norberg.)

The Court: That is right.

Mr. Young: Q. Just answer the question, please, Captain.

The Court: Q. How far up the range were you?

A. Well, the front range, I should judge, about seven hundred yards, six or seven hundred yards.

Q. Six to seven hundred yards. A. Yes.

Q. Well, now, how long do you understand that range to be, however? What is the total length of that range; do you know?

A. Oh, I couldn't tell you. We can see that range way up to St. John's, past Clark-Wilson's.

Q. As a matter of fact—pardon me. Did you finish your answer? A. Yes.

Q. As a matter of fact, Captain, isn't it true that steamers going down that range generally go much further down the range towards the west side than you did that night? A. Not necessarily.

Q. What do you mean, "not necessarily"?

A. You can go off anywheres there; the whole river is a channel there.

Q. You could have gone another two or three hundred yards down [426] the range and still have been in the channel, couldn't you?

A. Yes, sure, but it wasn't necessary.

Q. It wasn't necessary? A. No.

Q. You have mentioned that you could do that and still be in a channel. When you speak of "channel," you are talking about the 800-foot channel, are you not? A. Yes.

(Testimony of John Norberg.)

Q. And what water do you understand there is in the 800 foot channel?

A. Nothing less than thirty-five feet.

Q. There is thirty-five feet in the 800-foot channel?

A. Yes; it shows right there.

Q. Well, then that is your understanding, that it is thirty-five feet in the 800-foot channel; is that right?

A. Yes.

Q. Is there thirty-five feet of water in the 800-foot channel at the point where this collision occurred?

A. Just about.

Q. Just about. How wide is the thirty-foot channel?

A. I don't know where the thirty-foot channel is; only a small strip there that is thirty feet.

Q. Well, you didn't concern yourself about the thirty-foot channel; is that right?

A. No.

Q. You concerned yourself about the thirty-five-foot channel, [427] which you say is 800 feet wide?

A. The thirty-five-foot channel goes right up against the trees almost.

Q. Which channel goes up against the trees?

A. I say almost; I say it is almost, not——

Q. That is the thirty-five-foot channel?

A. Yes. It goes down to about twenty-four, just close by there, close to thirty-five. There you are.

Q. Well, now, Captain, will you step down to this map, please? What is the line to which I am now pointing?

A. Oh, that is the shoreline.

Q. That is the shoreline, isn't it?

A. Yes.

(Testimony of John Norberg.)

Q. What is the dotted line to which I am now pointing—

Mr. Wood: He has a right to look at the legend.

Mr. Young: Well, if he needs to. He doesn't need the assistance of counsel. If he needs to, he certainly may.

Mr. Wood: He has a right to see what the legend says before he is asked what a dotted line means.

A. Thirty-foot channel is the dotted line. Here is the thirty-five foot channel—this is the thirty-foot channel, right in there, just close by one another.

Mr. Young: Q. They are right close by one another? A. Yes, right close up.

Q. Now, Captain, the line to which I am now pointing and which [428] you have indicated, is a dividing line between the thirty and thirty-five-foot channel; is that right? A. Just about.

Q. Yes. How far is that from the east shore?

A. Well, I haven't measured that off.

Q. Can you do that with a pair of dividers?

A. Well, sure. Where do you want it from?

Q. Well, take it at the point of the collision over to the east shore. A. You want it over here?

Q. That is right. A. It is feet, ain't it?

Q. Yes. A. 400 feet.

Q. Now, Captain, in order that we may understand, this 400 feet of width that you have mentioned is all water, isn't it?

A. Yes, a few feet of water there.

Q. A few feet of water? A. Yes.

(Testimony of John Norberg.)

Q. Then between this boundary line that you have mentioned, between the thirty-five-foot channel and the thirty-foot channel there is 400 feet of water over to the east shore at the point where the accident happened; is that right?

A. Yes, but you can't get up there.

Q. That is what I am getting at. [429]

A. No vessel goes up there.

Mr. Wood: Q. You mean no deep-sea vessel?

A. Yes.

Mr. Young: Q. However, Captain, a light-draft river boat could proceed through that 400 feet of water in safety to itself, couldn't it?

A. No doubt about that.

Q. No doubt about that? A. No.

Q. During the past two years, I think you said you have been operating at night for the American-Hawaiian and during that period how much of the time, how frequently, would you say you have operated an American-Hawaiian vessel past Post Office Bar in the nighttime?

A. Twice a week passing there.

Q. Twice a week?

A. Yes; sometimes longer periods and sometimes shorter periods.

Q. Now, you have testified that you have hundreds of times passed ocean vessels port to port at that point? A. Yes.

Q. Now, have you ever had occasion to meet river boats at that point? A. Yes.

(Testimony of John Norberg.)

Q. In the night-time? A. Yes. [430]

Q. And how have you passed the river boats?

A. Most of the river boats take the port passing at nighttime.

Q. Most of the river boats take the port passing in the nighttime? A. Yes, port to port.

Q. Has that been your actual experience?

A. That is my actual experience?

The Court: Q. With tows?

Mr. Young: Q. Have they been with tows?

A. Yes.

Q. Now, what sort of tows? A. Barges.

Q. Barges and what?

A. Yes, barges, yes.

Q. Have you passed any river boats, for instance, at that point with log rafts? A. Yes.

Q. And on which side of the river have they passed you? A. They keep to the east side.

Q. They keep to the east side. The log rafts keep to the east side? A. Yes.

Q. Has that been pretty uniform, that you have always expected them to keep to the east side?

A. No, not always.

Q. Not always? [431] A. No.

Q. To what extent would you say the river boats with barges have used the east as distinguished from the west side, in your experience?

A. Well, fifty-fifty, mostly.

Q. Fifty-fifty. I will say nighttime?

A. At nighttime?

(Testimony of John Norberg.)

Q. Yes. How about daytime?

A. Daytime we don't pay no attention; we go all over then.

Q. You go all over then? A. Yes.

Q. In the daytime do the river boats use the east side at all?

A. Oh, yes, they use the east side, the west side; it just depends on where they are going, where they come from.

Q. Now, Captain, from your experience in the use of the river down past Post Office Bar in at least fifty per cent of the cases, you might expect that the river boat would be coming upstream over on the east side; is that right? A. No.

Q. I thought you said that the river boats used it about fifty-fifty?

The Court: Confine it to river boats with tows.

Mr. Young: River boats with tows, about fifty-fifty used the east side; is that right?

A. Yes. [432]

Q. Well, then, in piloting the Pennsylvanian down the Columbia River that night, it was no surprise to you to see a river boat with tow coming up the east side, was it?

A. No, I expected it to be over on the west side.

Q. You expected it to be on the west side?

A. Yes, she looked like she was on the west side.

Q. I am asking you whether, isn't it a fact that you may have well expected to see a river boat on the east side of the river that night based upon your prior experience? A. No.

(Testimony of John Norberg.)

Q. Well, then, what did you mean when you said a few minutes ago that you knew that river boats did at least to some extent with tows use the east side of the river?

A. I didn't expect that boat, which looks to be a large tug.

Q. It looked like a large tug? A. Yes.

Q. That boat, however, you say had a tow, didn't it? A. Yes.

Q. And you knew that it had a tow when you first saw it, did you not? A. Yes.

Q. How did you know that?

A. By the lights.

Q. And what lights were those?

A. Two mast lights. [433]

Q. Two mast lights? A. Yes.

Q. What did those two mast lights indicate to you as to the exact nature of that tow?

A. A barge or something alongside.

Q. A barge or something alongside?

A. Yes.

Q. I will ask you to state whether in your testimony before the Inspector on February 4, 1941, you were asked these questions and you gave these answers: "Question: When you sighted the vessel ahead, what lights did you see? Answer: Regulation towing lights and red port light." You so testified? A. Yes.

Q. Now, when you used the words "regulation towing lights," you meant these two mast lights?

A. Yes.

(Testimony of John Norberg.)

Q. "You saw the red side light and the towing lights? Answer: Yes." Did you so testify?

A. Yes.

Q. You were asked this question: "You saw the red side lights? Answer: Yes. Question: And the towing lights? Answer: Yes." You so testified?

A. Yes.

Q. "Question: At that time did you know there was a barge being pushed ahead of the vessel? Answer: No." Did you so testify? [434]

A. Yes.

Q. However, you have just said that you knew there was a barge being pushed in some manner by the vessel, haven't you?

A. Tied up alongside, perhaps.

Q. Alongside? A. Yes.

Q. Very well. I will ask you, were you not asked this further question and did you not give this answer: "Question: When you saw those lights, what did you figure was ahead? Answer: I couldn't figure anything except a tug boat pulling a log raft or something. I didn't see any tow." Did you so answer? A. Yes.

Q. Well, now, why did you say that you couldn't figure anything except the tug boat pulling a log raft?

Mr. Wood: Or something.

A. I couldn't see no lights on the tow. The lights will show what they got, what they are towing.

(Testimony of John Norberg.)

Q. Now, Captain, if that boat had been pulling a log raft, what lights would it have had on its mast?

A. Three lights.

Q. Three?

A. Yes.

Q. And you didn't see three, did you?

A. No. [435]

Q. It had just two?

A. Yes.

Q. Isn't it a fact then that you knew that boat was not pulling a log raft?

A. Lots of times, you know, the light will go out. I have seen lots of times that the light will flicker out and they come with two lights when she should have three and you can't never depend on the lights. They will break down occasionally, too, like everything else, so you have to be careful about that, you know, when you navigate in the rivers.

Q. Well, Captain, in the absence of any information otherwise, wouldn't you, when you saw those two mast lights, assume that there was no log raft behind; isn't that true?

A. You might have something behind. I have seen them come up there with no lights sometimes.

Q. Captain, when you say that you actually saw the two mast lights——

A. Yes.

Q. ——the first thing that would flash across your mind would be that that boat does not have a tow, does not have a log raft behind; isn't that true?

A. Yes.

Q. However, on this particular night you were in doubt as to what she was pulling; is that right?

A. What? [436]

(Testimony of John Norberg.)

Q. On the night of this accident you seemed to be in doubt as to whether she had barges alongside or was pulling a raft behind; is that right?

A. No, I wasn't in doubt; I just waited until I got up to her.

Q. You waited until you got up to her to see what she did have; is that right?

A. Well,——

Q. Now, you testified, Captain, that you saw the two mast lights, that is, the white lights above each other and you saw one of the side lights; is that correct?

A. Yes.

Q. Now, which one was that?

A. The port light.

Q. The port light. A. The red light.

Q. That would be the red light. You also said you saw some deck lights. Now, where were those?

A. Right along the house on the port side of the steamer.

Q. Well, now, are those lights that you mean were coming out from cabin windows or something of that sort?

A. Under the ceiling, I suppose, and along the house.

Q. They were not navigation lights?

A. No.

Q. In any event, you knew where the boat was as you looked at it, did you not? [437]

A. I could see the angle where she was heading by those house lights. If she had come head-on.

(Testimony of John Norberg.)

I couldn't have seen those lights, but she was heading away from me. That is why I saw the lights on the port side.

Q. The only lights which you state gave you any information as to what this boat was towing were just the two mast lights; is that correct?

A. Yes.

Q. Now, if you had assumed that there was a log raft behind that boat, you would have had no way of knowing how long the log raft was, would you?

A. No, not at that point.

Q. How close would you have to get to determine that?

A. Well, half a mile or so.

Q. Well, if it had a log raft, say, a thousand feet long, you certainly wouldn't expect that boat to cross the river and get over on the west side, would you?

A. Why not? They got the storage booms down there on that side.

Q. Would you have expected a river boat with a tow a thousand feet long to have crossed your bow that night, to get over onto the west side of the river?

A. I didn't expect anything; I just took the circumstances as they came.

Q. Well, I am asking you, you were uncertain as to what this boat was pulling, weren't you? [438]

A. She was a tug, so she must have something.

Q. You said you didn't know but what it might be a tow of logs?

(Testimony of John Norberg.)

A. She had something; I knew she was pulling something.

Q. Now, I am asking you the question, Captain, if that boat were pulling a log raft, say of a thousand feet in length, you certainly wouldn't expect to have to stop in the river and wait there until that boat crossed the stream to the west side, so that you could make a port to port passage, would you? A. Sure.

Q. You would expect to do that?

A. Oh, yes. We have done that all the time.

Q. I see. And the log rafts just go right across the river in the nighttime there, across your bow?

A. Yes. We do that often, quite often.

Q. How frequently have you ever had that experience at this particular point?

A. I can't remember any particular time or anything. We never check up all those things.

Q. Now, is there any difference in the speed at which you operate one of your American-Hawaiian vessels going downstream with respect to whether you are within the city limits or are below the city limits?

A. The city limits is always the speed limit, you know.

Q. What is that speed limit?

A. Well, you can go about eight knots, six to eight knots. [439]

Q. Yes, but you are outside the city limits when you reach the vicinity of Post Office Bar, aren't you? A. Yes.

(Testimony of John Norberg.)

Q. Where are those city limits with reference to the place of this accident?

A. At Terminal 4, a little above West Oregon mill.

Q. The speed limit does not apply, then, below the West Oregon mill, does it? A. No.

Q. Before you saw the Barry "K", what was your speed? A. Going slow.

Q. Well, how slow?

A. Four knots, I should judge.

Q. And when you first saw the Barry "K", what did you do with your speed?

A. I had just started full speed when I saw the Barry "K".

Q. You say you had started full speed?

A. Yes, just about the time I sighted her.

Q. And throughout what distance did you continue full speed?

A. Oh, there was just a minute or two, perhaps. It didn't make much difference in the speed hardly. We gained, perhaps, about three or four miles an hour in the long run.

Q. Well, when you first saw the Barry "K", you didn't change your speed, did you?

A. No. [440]

Q. You were still going full speed ahead then, weren't you? A. Yes.

Q. If your boat were traveling at full speed under the circumstances which existed at the time of this accident, how fast would she be going through the water? A. Twelve knots.

(Testimony of John Norberg.)

Q. Twelve knots? A. Yes.

Q. And translating that into English miles, what would that be?

A. Well, it would be about thirteen and a half.

Q. Thirteen and a half miles per hour?

A. Yes.

Q. Now, would you add to that the amount of current in the river or does that allow for current?

A. Well, in the Willamette River there is hardly any current here.

Q. You testified there was between a half a knot to a knot, didn't you?

A. Yes; that doesn't make much difference in fifteen or twenty minutes.

Q. Well, now, but for the difficulty which you got into on this signal question, what would you have done about the speed of your vessel in going down past this approaching river boat?

A. I was going half speed; I had it down to half speed. [441]

Q. But you didn't put her down to half speed when you first saw the vessel, did you?

A. No, she was far enough away then, you know; you have got plenty of time to slow up.

Q. And what point of time, but for what took place there, would you have slowed her up?

A. Oh, just about the time I slowed her down.

Q. And how far were you from her when you started to slow down?

(Testimony of John Norberg.)

A. Oh, a good half a mile or more.

Q. At what speed would you have expected to pass that river boat?

A. Oh, about four knots; perhaps less; three or four knots.

Q. And what is the reason that you would have slowed down?

A. Well, I would slow down to pass a tug.

Q. Why?

A. Well, we don't want to embarrass the tug.

Q. Why would you embarrass the tug?

A. Well, they always got some barges and one thing and another.

Q. Might break the lines, for instance?

A. Break the lines or jump the logs out of the booms, or something.

Q. What was the maximum speed that your boat attained before the accident?

A. About seven knots, I should judge.

Q. Traveling at seven knots an hour going downstream, if you wanted to stop that vessel completely, in what distance would you [442] be able to bring her to a stop?

A. Oh, about half a mile.

Q. Half a mile?

A. Perhaps. It just depends on the conditions, the draft of the vessel, and so on.

Q. Well, the American-Hawaiian Pennsylvanian is a pretty efficient craft, isn't it?

A. Yes.

(Testimony of John Norberg.)

Q. If you proceeded to stop her, she will stop as rapidly as most other ships, won't she?

A. Yes.

Q. Of an ocean-going type? A. Yes.

Q. At the time that you actually did give the order to stop, what was the speed of the Pennsylvanian?

A. She was about seven knots then.

Q. She was seven knots——

A. No, when I ordered half speed, you know, then she slowed down, I should say, to about five knots.

Q. Then when you ordered the engines full astern, at that time what was the speed?

A. Well, about four or five knots, I should judge; it is pretty hard to tell.

Q. How far were you from the Barry "K" at that time?

A. Oh, about a quarter of a mile. [443]

Q. What distance would it take you to stop going four or five knots an hour?

A. Oh, if that object is still, don't move through the water, I will stop in that quarter of a mile.

Q. You will stop in that distance?

A. Yes, if that object is still, but if it moves towards me, I couldn't do it.

Q. Well, at the time that you gave the order to full speed astern, though, the Barry "K" was going over towards the east side of the river, wasn't she? A. Yes.

(Testimony of John Norberg.)

Q. In other words, she was cutting across your course then?

A. She was crossing my bow then.

Q. Captain, was the Pennsylvanian equipped with anchors on her forecastle head?

A. Yes.

Q. Did you examine the anchors that night?

A. It is up to the Mates to do that.

Q. Wasn't it part of your business as a pilot to know whether the anchors were in condition to be used? A. Yes.

Q. Were they in condition to be used that night? A. They were.

Q. They were? A. Yes. [444]

Q. Who was on the forecastle head that night to lower the anchor if you ordered it to be dropped?

A. There was no one there. We had passed the city limits; the Mate goes off the forecastle head; we don't anticipate any trouble that we would have to let go the anchor every turn we make in the river. We don't anticipate that.

Q. Well, accidents are never anticipated, are they; you don't expect to have accidents?

A. No, that is it.

Q. Nevertheless, in the operation of your boat you have to allow for that contingency, don't you?

A. Oh, yes.

Q. Well, how many anchors did she have on the forecastle head? A. Two.

Q. Were those anchors in condition that they

(Testimony of John Norberg.)

could be lowered that night if orders were given to have them lowered?

A. Yes, but in close quarters the anchors are no good.

Q. Well, just a minute. Just answer my questions, please, Captain. As I understand, there was nobody on the forecastle head that night who could drop those anchors if you gave the order to drop them; is that right?

Mr. Wood: If your Honor please, I am going to object to this line of examination. There isn't any semblance of a charge in the pleadings to substantiate any evidence of this kind. It is perfectly ridiculous. No ship keeps a Mate on the forecastle [445] head going down the river to drop anchor. There isn't anything charged about it and I object to it.

Mr. Young: Counsel always makes very powerful assertions as to what the practices are, your Honor, and I take issue definitely with him on that particular point. The libel in this case expressly charges that the *Pennsylvanian* did not stop at any time before the accident. Now, one of the methods of stopping a vessel is to throw out the anchor. This is simply a detail under the general charge.

The Court: Continue.

(The last question was read by the reporter.)

A. Yes, that is right.

(Testimony of John Norberg.)

Mr. Young: Q. That is correct? A. Yes.

Q. And at no time that night did you ever give the order to anyone to drop the anchors, did you?

A. No.

Q. Assuming, Captain, that there had been a member of the crew on the forecastle head whose duty it would have been to drop the anchors under orders, how long would it take to get either one or the other of the anchors down from the time the order is given?

A. About four or five minutes.

Q. Four or five minutes? A. Yes.

Q. Are you sure of that? [446] A. Yes.

Q. Have you ever had the experience that it would take four or five minutes to get the anchors down?

A. To get him out from his quarters and send him up there in the forecastle head, he has got about 200 feet to walk or run.

Q. Captain, the question that I asked you assumed that there was someone on the forecastle head to obey your orders when you gave them. Now, assume the man is actually there and you order him, let us say, to drop the starboard anchor, how long would it take him actually to get that anchor out?

A. He could get it out right away, if he is there.

Q. If he is there? A. Yes.

Q. If he is not there, of course he wouldn't get it out right away? A. No.

(Testimony of John Norberg.)

Q. Now, Captain, the whistle which you first say you heard from the Barry "K" was one blast; is that correct? A. Yes.

Q. And then you answered with one blast?

A. Yes, sir.

Q. Is that right? A. Yes.

Q. That called for a port to port passage?

A. Yes.

Q. What was the next blast, though, you heard from the Barry "K"? [447]

A. A group of whistles.

Q. Now, when you heard the group of whistles, were you able to identify what they were?

A. No.

Q. Do you know how many blasts there were?

A. Oh, there was five or six of them.

Q. What would five or six blasts mean to you?

A. Well, four blasts means danger signals and five or six or seven, I suppose they mean the same thing to some people.

Q. Well, as a matter of fact, don't the pilot rules provide that the danger signal is four or more blasts?

A. Yes; we generally use four on ships.

Q. Well, if you then had heard four or more blasts, you would understand that to be a danger signal, wouldn't you? A. Yes.

Q. Now, at the time that you heard this first group of blasts from the Barry "K", how far was the Pennsylvanian from her?

(Testimony of John Norberg.)

A. Well, I guess a couple of thousand feet anyway.

Q. A couple of thousand feet?

A. Yes, all of that.

Q. At that time what orders did you give?

A. Either half speed or stop.

Q. Did you give the orders for half speed or stop at that time?

A. Half speed or stop, I said.

Q. Which did you do? [448]

A. Well, we will call it half speed, then.

Q. Call it half speed. How much time elapsed between the time you heard the first group of whistles from the Barry "K" and the second group?

A. Not very long. They came right on top of one another.

Q. You heard as a matter of fact three of these grouped whistles, didn't you? A. Just about.

Q. And was each one of those three a series of whistles of at least four in number?

A. Yes, all of that.

Q. Then each of those groups of whistles necessarily meant to you a danger whistle, didn't it?

A. Yes.

Q. And the first one of those you heard when you were two thousand feet apart; is that right?

A. Yes.

Q. But there was no point of time when you got stopped before the collision occurred, was there?

A. Beg pardon?

(Testimony of John Norberg.)

Q. Your vessel did not come to a stop at any time before the collision occurred?

A. No, she had a little headway when the collision took place, or else the other one pushed the barge up against us, either one.

Q. Well, was the Barry "K" moving when the collision occurred; [449] do you know?

A. Yes.

Q. How fast was she moving?

A. Well, she wasn't moving very fast. We was swinging away from her and she was coming in close on us faster than we could swing away from her.

Q. At the time you heard that first danger signal from the Barry "K", was she then crossing your bow towards the east bank?

A. No, she was away over on the other side, at least she was on our port bow.

Q. On your port bow? A. Yes.

Q. What running light did you see at that time?

A. I saw her the first time, you know, I saw a red light.

Q. Yes. Then you saw the green light just after?

A. Then it came back with another group of blasts and she showed a green light.

Q. What I want to get at is this: When did you see the green light with reference to the time that you heard this first group of blasts from the Barry "K"?

(Testimony of John Norberg.)

A. There was a second group of blasts; I saw the green light.

Q. The second group of blasts? A. Yes.

Q. And how far apart were the vessels at that time?

A. 1,500 feet or more. Twelve or fifteen hundred feet, I should [450] judge.

Q. And at that time the Barry "K" was then crossing your bow toward the east bank, wasn't it?

A. Yes. Apparently looked that way.

Q. Pardon?

A. Apparently looked that way.

Q. That would be obvious to you if you saw her green light, wouldn't it? A. Yes.

Q. Now, you could follow her course then, couldn't you, by that green light; isn't that right?

A. What do you mean by follow——

Q. As long as you saw her green light?

A. Yes.

Q. You knew that she had her starboard side towards you, didn't she? A. Yes.

Q. And she must, therefore, be going toward the east bank? A. Yes.

Q. Was there any point of time when you ever gave orders to veer the bow of your ship around to your port side?

A. No, it couldn't be done at that time.

Q. Why couldn't it be done?

A. Too close.

Q. Well, you have said that you heard the

(Testimony of John Norberg.)

first danger signal [451] when you were two thousand feet away, didn't you? A. Yes.

Q. And the second danger signal when you were somewheres around 1,500 feet away?

A. Yes.

Q. Is 1,500 feet too close? A. Yes.

Q. To swing the bow of your vessel?

A. Yes, when the vessel is about two points on the port side, it is too close.

Q. Well, isn't it a fact that if you had swung that vessel as little as one or two points to your port side, you would have missed the Barry "K" altogether? A. No, I would have hit her.

Q. You would have hit her? A. Yes.

Q. You have testified that you saw no lights whatever on the barges until you were right up close; is that it; is that correct?

A. Didn't see no light before or after the collision.

Q. Either before or after the collision?

A. Just after the collision we found a little lantern there.

Q. How close were you to the barge at the time that you put the search light on the barge?

A. The barge was right alongside of us, a little ahead of us.

Q. Were you in contact with the barge at that time? [452]

A. No, we was clear of the barge.

Q. In the clear of the barge?

(Testimony of John Norberg.)

A. Yes.

Q. Were there any other lights around there at that time other than your search light playing on the barges? A. No, just our search light.

Q. Just your search light? A. Yes.

Q. Were the lights in any of the cabins of the Barry "K" lighted up at about that time or just after the collision occurred?

A. No, the Barry "K" was laying on the west side of the river then.

Q. Well, now let me get this clear. At the time that you were inspecting these barges with your search light to see whether they had any lights on them—— A. Yes.

Q. ——do I understand the Barry "K" was across the river at that time? A. Yes.

Q. Well, then, this is sometime after the accident?

A. No, the Barry "K" backed away right away as soon as we hit the barge, she backed away and she went across on the other side.

Q. She stayed there long enough for you to have some conversation with her skipper, didn't she? A. No, I don't—— [453]

Q. Didn't you say you called out to see if there was any help that could be given, you or Captain Vaux? A. Captain Vaux——

Q. Then do I understand that just after that she backed across the river?

A. She was backing away across the river at that time.

(Testimony of John Norberg.)

Q. Now, the time, however, when you played the search light on the barges was after the Barry "K" had gotten over to the west side of the river; is that correct?

A. She was going over there then.

Q. She was going over? A. Yes.

Q. How far across was she at that time?

A. Oh, I couldn't watch the Barry "K" and the barges and the ship and all at one time.

Q. Now, did you play your search light all around those barges? A. Yes.

Q. Both barges? A. Yes.

Q. Were you ever able to determine which barge was on the nose of the Barry "K"; did you see any number? A. Yes, 22.

Q. Did you see the number on the barge?

A. Yes, we saw the lights on it.

Q. And which barge was it on which you saw this little lantern [454] that you were talking about? A. It was on 22.

Q. On 22? A. Yes.

Q. Now, which corner was the lantern on?

A. On the corner—well, we seen the barge up this way, on the port corner when the barge swung around.

Q. On the port corner of barge 22?

A. Yes.

Q. Which corner, forward or aft?

A. Supposed to be aft, I guess, after the barge swung around.

(Testimony of John Norberg.)

Mr. Wood: Q. After it swung around, he said.

A. (Continuing) Yes.

Mr. Young: Q. At the hearing before the Inspector were you asked this question and did you give this answer: "At the time of the collision or thereabouts did you see any lights on the barge? Answer: Just as the collision took place I saw a light on one corner of the barge, some light standing on the deck, on the corner of the barge next to the tug"? A. Yes.

Q. Is that right? A. Yes, sir.

Q. On the corner of the barge next to the tug. Well, now, is that the barge that was on the nose of the tug? A. I presume it was. [455]

Q. Then, if the light was on the corner of the barge next to the tug, it would be on the after corner, wouldn't it?

Mr. Wood: Pardon me, if your Honor please. Counsel, I think, has misinterpreted that testimony. It isn't the corner next to the tug he is talking about; it is the barge next to the tug.

Mr. Young: Well, if the Court please, I am cross examining this witness; it seems to me this witness doesn't need the help of counsel. I will read this answer again so that if there is any clarification the witness wishes to give, he is very welcome to do so.

Q. I want now to read to you your answer at the hearing before the Inspector and will you tell me whether you so testified: "Just as the collision

(Testimony of John Norberg.)

took place I saw a light on one corner of the barge, some light standing on the deck, on the corner of the barge next to the tug." Did you so testify?

A. Perhaps I did. I guess that is right.

Q. What I am getting at is this: If it is correct that the light which you saw was on the corner of the barge next to the tug, you are referring there, are you, to the barge that was being pushed on the nose of the tug; is that correct?

A. Well, the barges were mixed up at that time, you know, so they were all swinging around; they was all adrift. So I presume there was the one that was pushed, had the light next to the tug, as near as I could figure out.

Q. As near as you could figure out, yes. [456]

A. As near as I could figure out at that time, standing on deck.

Q. Now, did you see any number on that barge at the time that you saw this lantern on it?

A. Well, I can't remember if I took the number of the barge at that time or not. We just took the number of the barges and as a general routine.

Q. Well, you are not certain then as to where this lantern was that you saw?

A. I think Captain Vaux, he can inform—because he was using the search light and he was doing the figuring out and I was handling the ship.

Q. Now, how far was the other barge away at this time?

A. They wasn't very far apart.

(Testimony of John Norberg.)

Q. Did you play the search light on the other barge?

A. I believe Captain Vaux did that, you know.

Q. Did you pay any attention to the other barges.

A. Oh, yes, I was watching it.

Q. I mean after the accident now?

A. Oh, yes.

Q. Were you examining the other barge for the purpose of seeing whether there were lights on it?

A. I didn't see no lights on that other barge.

Q. Did you look to see if there were lights there?

A. Yes, but there wasn't any. I didn't see none. [457]

Mr. Young: I wonder, your Honor, if we could have just a few minutes recess?

The Court: Yes, and before we recess, Captain, you said a while back that you thought this was a large tug. Do you remember saying that?

A. Yes.

Q. And then you followed that by saying, which it seemed to me had some connection with the size of the tug, that you thought she was—that you expected her to be on the west side of the channel?

A. That is right.

Q. Just explain that a little further.

A. Yes. Large tugs, when they come up, you know, as a rule they take the curve right—you take those little diesel boats that comes up, they go almost anywheres; they don't take up much room. Small ones.

(Testimony of John Norberg.)

The Court: We will recess now for fifteen minutes.

(Whereupon at 9:40 o'clock A. M. a short recess was taken.)

Mr. Young: Q. Captain Norberg, how far is the bridge of the Pennsylvanian from the bow of the ship, approximately?

A. I guess about 200—I couldn't tell you.

Q. The ship itself is something over 400 feet long, isn't it? A. Yes.

Q. Are you half way back towards the stern?

A. I think the bridge is forward of midships; I believe so; I wouldn't say. [458]

Q. The bridge is forward of midships?

A. I believe so.

Q. There is a substantial part, however, of the vessel that is between you and the bow, isn't there, when you are on the bridge? A. Yes.

Q. How high are you above the water level when you are on the bridge?

A. Well, that is a problem—I think 38 feet is the height of the eye, or something like that.

Q. About 38 feet?

A. Something like that.

Q. How many independent pilots are there in the Columbia-Willamette rivers territory?

A. There are six or seven.

Q. Six or seven? A. Yes.

Q. Do you know how many pilots there are that belong to the association? A. I don't know.

(Testimony of John Norberg.)

Q. Do you think there might be thirty, thirty-five? A. I suppose so; I don't know.

Q. You don't know about that.

Mr. Young: That is all.

Redirect Examination [459]

By Mr. Wood:

Q. Just along the line of that last question about the independent pilots and the Columbia River association pilots, what is the feeling between the association pilots and the independent pilots?

A. Not very good.

Q. Not good. And the association pilots are members of a union, are they not?

A. Yes, sir.

Q. To which you men refuse to belong; is that the fact?

A. We got expelled out of it.

Q. Now, Captain Norberg, you answered some questions about where you had piloted and said that your piloting had been for the American-Hawaiian and Luckenbach only, and I think the Court brought out the fact that that was referring to these rivers only, the Columbia River?

A. That is right.

Q. (Continuing) And Willamette River. But is it true that you have piloted in other waters?

A. Yes, sir.

Q. And for other employers?

A. I piloted my own ship when I was Master of a ship.

Q. And what other waters have you actually served as pilot in? A. As Master and pilot?

(Testimony of John Norberg.)

Q. Yes. [460]

A. Puget Sound, adjacent inland waters, San Francisco Bay to Antioch, San Joaquin River, San Pedro, San Diego, Humboldt Bay, Coos Bay, Willapa, and Grays Harbor.

Q. Then it is not true, is it, that most of your piloting experience has been in the Columbia River and in the open sea? A. No.

Q. That is not a fact, is it; I mean you have piloted many places except the open sea, haven't you? A. Yes, lots of places.

The Court: On inland waters?

Mr. Wood: Inland waters, yes.

A. (Continuing) Inland waters.

Mr. Wood: Q. Now, when you saw the Barry "K", the lights of the Barry "K", the two white lights and the red light below you down the river, tell us again, because I have forgotten myself, about how far down you think she was.

A. About a mile; a little less, perhaps.

Q. At that time when you first saw her, could you tell on which side of the river she was on?

A. She was coming down in midchannel, I presume.

Q. I don't know what you presume; I want to know whether you could tell by her lights on which side of the river she was? A. I couldn't.

Q. So that when you marked her position there on the chart at my request, you were indicating how far down the river she [461] appeared to be rather than on which side she was; is that right?

(Testimony of John Norberg.)

A. Yes.

Q. Now, counsel asked you some questions about when you went full speed ahead as you came down the channel there and you said you did go full speed ahead. I want to know whether you are referring to full speed ahead through the water, twelve knots, or full speed ahead on your engines; which did you mean?

A. Full speed ahead on the engines.

Q. And do you know how long you went full speed ahead on your engines?

A. Three or four minutes.

Q. Would she pick up her full speed of twelve knots in that time? A. No.

Q. What maximum speed through the water did she attain, in your opinion?

A. Seven knots, perhaps; six or seven.

Q. Now, in the testimony that you gave as to when you heard the danger signals or what lights you saw from the Barry "K" when you heard her danger blasts, were you testifying from recollection or from reference to any log books or bell books or knot books or anything else?

A. Just from my own memory.

Q. You gave some testimony which seemed inconsistent to me. I will ask you about it. Do you remember testifying that when you saw the green light of the Barry "K" she was far enough away [462] from you so that you thought that she had taken some momentary sheer or got out of

(Testimony of John Norberg.)

control in some manner for a short time and would go back on her course; you so testified, didn't you?

A. Yes.

Q. That is when she was showing you her green light? A. Yes.

Q. And then a little later you testified in answer to Mr. Young's questions that when she was showing you her green light was when she blew her second blast of danger signals; do you remember saying that to him?

A. I guess it was my error.

Q. What? That is what I want to clear up, when she was showing you her red light.

A. Yes.

Q. Did she ever blow you danger signals then?

A. No, I never thought she would come back; I thought she would keep on going on her own side.

Q. And when she swung around and showed you her green light, you still thought everything was safe? A. Sure.

Q. What? A. Yes.

Q. And then it was after she showed you the green light that you heard her first blast of danger signals, was it?

A. That is about as near as—— [463]

Mr. Wood: That is all.

Recross Examination

By Mr. Young:

Q. Captain, did you come to any conclusion as to why the Barry "K" was blowing danger signals at all? A. No.

(Testimony of John Norberg.)

Q. You didn't have any idea why the signals were being blown?

A. I couldn't see no danger.

Q. So that so far as what you could see was concerned there was no reason at all for the Barry "K" to be blowing those danger signals?

A. No.

Mr. Young: That is all.

Mr. Wood: I forgot to ask another question I would like to ask.

Redirect Examination

By Mr. Wood:

Q. I don't really remember what you testified to about what you did with your engines when you heard the first blast of danger signals, but regardless of what you testified, in the recess that we just had did you at my request look at the bell book of the Pennsylvanian; did you look at the bell book of the Pennsylvanian? A. Yes.

Q. And what does that show that you put your engines at at 12:50? A. Full ahead.

Q. And how long does it show you ran full ahead? [464] A. 12:54.

Q. Four minutes?

A. Yes. Half and stop.

Q. Now, at 12:54 what did you do with your engines? A. Half and stop.

Q. And what does that mean, half and sop?

A. Well, two bells come together, you know.

(Testimony of John Norberg.)

Q. Does half mean half speed?

A. Yes. When you put the telegraph—you might stop for a second on half and then run it down full astern.

Q. Well, does half and stop mean that the stop followed immediately on the half?

A. Yes, a split second.

Q. So it is part of really the same signal?

A. The same signal.

Q. And that was at 12:54? A. Yes.

Q. What? A. Yes.

Q. Now, in relation to that——

The Court: In other words, it is a stop signal?

Mr. Wood: Yes.

Q. Now, at 12:54—— A. Yes.

Q. ——why did you stop then; what did you hear from the other ship [465] which caused you to stop? A. A danger signal.

Q. Was that the first one you heard?

A. Yes.

Q. How long—well, I will let the bell book speak for itself later on. Although for your Honor's information, what does the bell book show as to the time of the collision? A. 12:55.

Q. One minute after your stop?

A. Yes, full astern stop.

Q. That is, your engines were full astern at 12:55? A. Yes.

Q. What? A. Yes.

Q. And the entry in the book shows you hit at 12:55?

(Testimony of John Norberg.)

A. That is the nearest minute. Never split the minutes in the bell book.

Q. The entries in the bell book are made to the nearest minute? A. Yes, that is all.

Q. How much of an interval was there really between your full astern and the collision; how long a time? A. Pretty near a minute.

Q. What?

A. Pretty near a minute. [466]

The Court: Did the Captain say whether there were two sets of danger signals or three, or did he attempt to be specific?

Mr. Wood: I don't think he attempted to be very specific.

Mr. Young: He said three, your Honor.

Mr. Wood: I thought he said they were coming so fast; that is my recollection. I would like your Honor to ask him.

The Court: Clear it up then.

Mr. Wood: Q. Well, Captain, the Court wants to know whether you heard two sets of danger signals, three sets of danger signals, or whether they were so consecutive it was hard to tell or whatever it was; how was it?

A. I don't know how many they was; they was coming too fast and too close together. There was hardly any interval.

The Court: Q. Without any interval?

A. Yes.

Mr. Wood: That is all.

(Testimony of John Norberg.)

Mr. Young: If the Court please, I would like to have the reporter refer back to the early part of his notes, because I have very definite notes——

The Court: We can't do it now.

Mr. Young: I would like the record to show that I would like to have my notes corrected. My notes show three sets of danger signals.

The Court: The word "three" was used; whether by you or the captain, I am not sure. The Captain will be here all the time? [467]

Mr. Wood: Oh, yes.

Recross Examination

By Mr. Young:

Q. Now, the steamer Pennsylvanian would answer her helm readily, would she not?

A. Oh, yes.

Mr. Young: That is all.

Mr. Wood: That is all, Captain.

(Witness excused.) [468]

EARLE B. VAUX,

produced as a witness in behalf of the Respondents, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wood:

Q. Captain Vaux, you were Master of the Pennsylvanian on the night of the collision with the Barry "K", weren't you? A. Yes, sir.

(Testimony of Earle B. Vaux.)

Q. And as a preliminary matter, where do you live, Captain?

A. In Seattle, 2416 42d Avenue, North.

Q. And the Court asked Captain Norberg his age; I will ask you, how old are you?

A. Thirty-five.

The Court: Q. Native born?

A. Massachusetts born.

Mr. Wood: The best kind of native born.

Mr. Young: That is a good state, too.

Mr. Wood: Q. How long had you been Master of the Pennsylvanian before this collision?

A. A year.

Q. Are you still her Master?

A. Yes, sir.

Q. Is she in port now?

A. She is en route to Portland from San Francisco now.

Q. And you came up from San Francisco ahead of the ship for the purpose of testifying here, did you not? [469]

A. Yes, that was the reason.

Q. You and Third Mate Nelson flew up, didn't you? A. That is true.

Mr. Young: My understanding is that this is his vacation period.

The Witness: Quite correct, sir.

Mr. Wood: That is rather hard on him.

Q. Captain, tell us in a general way your seafaring experience?

(Testimony of Earle B. Vaux.)

A. At the time I started at sea until the present time, is that what you wish to know?

Q. Yes, briefly; not too much detail.

A. Well, in 1924 on the schoolship Nantucket of Massachusetts, spent two years, a course, graduated as Cadet Master of the schoolship. From there I went to the American-Hawaiian Steamship Company as quartermaster in 1926, May; promotions followed one upon the other from quartermaster to Fourth Mate, to Third Mate and Second Mate, Chief Mate, and finally Master.

Q. You have been in the American-Hawaiian's employ then for quite a considerable period?

A. Yes, sir.

Q. How long have you held Master's papers?

A. Ten years.

The Court: Q. Have you been in a collision before? A. No, sir.

Q. Have you been on the witness stand before? [470]

A. Yes, sir, once in an accident for stevedores.

Mr. Wood: Q. Now, Captain Vaux, what was the night like on this collision night?

A. My recollection of the night and also my report to my office and the Steamboat Inspectors was "overcast and calm and smooth."

Q. Does calm mean no appreciable wind?

A. No appreciable wind, yes, sir.

Q. How was the visibility?

A. Very good.

(Testimony of Earle B. Vaux.)

Q. Will you——

The Court: Where was the boat going, Mr. Wood?

Mr. Wood: Q. Where was the boat bound for?

A. Bound for Astoria.

Q. And from there? A. From Portland.

Q. What?

A. Astoria; she was bound to Astoria from Portland.

Q. And then from Astoria where was she going?

A. Bound north to Puget Sound, that is, Seattle and Tacoma and various ports on Puget Sound.

The Court: Q. When were you due in Astoria?

A. Six hours from the time we left Portland; I mean that morning at eight o'clock the gangs——

Q. They had been ordered for eight o'clock?

A. Yes, sir, at Astoria. [471]

Mr. Wood: Q. Was the ship then in the inter-coastal trade?

A. She was in the intercoastal trade, yes, sir.

Q. By the way, is there any certainty nowadays in the movements of these vessels?

A. Not nowadays, no, sir.

Q. Where do you expect to go to next?

A. The Red Sea.

Q. The Red Sea? Where is McPhee, who was Chief Officer on this ship, right now?

A. Due to the fact that he lives in Gloucester, he has to be transferred to a North Atlantic ship and he was transferred to a North Atlantic ship.

(Testimony of Earle B. Vaux.)

Just where he is now, I don't know. He is Chief Mate of one of the company's vessels that was running to the North Atlantic service.

Q. The reason I asked you, I thought you told me he was on his way to the Red Sea.

A. I couldn't be positive of that.

The Court: Q. Do you know whether it is any hotter in the Red Sea than it has been here?

A. I doubt it, your Honor.

Mr. Wood: Q. Now, Captain Vaux, who was on the bridge on the night of this collision?

A. Pilot John Norberg and Mr. Nelson, the Third Mate, and the helmsman, Meagher.

Q. And yourself? [472]

A. And myself, yes, sir.

Q. Did you have a lookout forward?

A. Yes, sir, there was a lookout forward.

Q. A seaman? A. I beg your pardon.

Q. A seaman posted forward?

A. A seaman, yes, sir.

Q. And who was conning the ship?

A. Pilot Norberg.

Q. Were you taking an active supervisory part in the navigation?

A. Yes, sir; that is my duty.

Q. The Master, in spite of a pilot being aboard, always remains in supreme command, does he not?

The Court: How long had he been a Master, Mr. Wood?

Mr. Wood: Q. How long had you held Master's papers? A. Ten years.

(Testimony of Earle B. Vaux.)

Q. How long had you had the *Pennsylvanian*?

A. One year, sir.

The Court: Q. You might have the papers without having a ship, might you not? How long had you had a ship as a Master?

A. A year.

Q. The *Pennsylvania* was your first ship as a Master?

A. No, the *Kansan* was my first ship.

Q. But you have had ships as a Master for one year? A. Yes, sir. [473]

Mr. Wood: Q. You mean one year before the collision?

A. No, nearly a year on the *Kansan* and it figured about six months on the *Pennsylvanian* at the time, figuring a year and a half on total capacity as a Master.

The Court: Q. Until the accident?

A. Yes, sir.

Mr. Wood: Q. Is it expected of you to know the beacons and navigation lights, all those things, and be intimately familiar with them all up and down this river? A. No, sir, it is not.

Q. I asked you that, because when I am about to ask you about the collision, the place in the channel, and so forth, I don't know whether you know those lights or the names of them sufficiently to identify the position of your ship with relation to the lights or not—do you? A. No, sir, I don't.

Q. Will you please—and you can refer to your

(Testimony of Earle B. Vaux.)

log book, bell book, if you want to—tell the story of the Pennsylvanian's departure from Portland down to the time of the collision? Here are these books, if you want to look at them.

A. Thank you. The Pennsylvanian was due to sail from Portland to Astoria at midnight, and she left on time, nearly on time. She left at 12:03 from Portland; various moving bells, swung around and headed downstream, passed through the railroad bridge and St. John Bridge and at Terminal 4, I believe it is, the city [474] limits, she was clear of the city limits and at that time which I refer to—the time in the bell book here is 12:50—the engines were put full ahead.

Q. Full ahead?

A. I will check back on that, sir.

Mr. Young: May I interrupt with a question, your Honor? I would like to inquire as to whose handwriting that book is in?

A. Well, perhaps I might ask if it is correct that I ask Mr. Nelson if it is his handwriting, which I believe it is.

Q. You are not sure yourself?

A. It is not my handwriting.

Q. It is not yours? A. No, sir.

Mr. Wood: I will ask a question about that. That is the official bridge bell book kept on your ship, is it not? A. It is the official——

Q. And it is the duty of the Third Officer, who is on the bridge, to keep it, is it not?

(Testimony of Earle B. Vaux.)

A. Whoever is on watch, Mr. Wood.

Q. And on this occasion, is was Nelson, was it not?

A. It was Nelson, yes, sir.

Q. And the book is kept under your supervision as a part of a ship's regular duty and routine, is it not?

A. It is, sir.

Q. That is all. [475]

A. At 12:50 the engines were put full ahead and at that time I did see what later turned out to be the Barry "K". At that time that I did see the Barry "K" I was standing in the wheelhouse just close to the threshold in the door on the port side and then upon sighting the lights that turned out to be the Barry "K" towing, I stepped out onto the bridge for the purpose of listening for signals.

The Court: Did you use the word "towing" there?

A. I did use the word "towing," yes, sir.

Mr. Wood: Is your Honor familiar with the construction of the bridge?

The Court: I have heard some here and then I have heard some in other cases.

Mr. Wood: Q. Perhaps I will have Captain Vaux just describe how the bridge is constructed, particularly what part of it is enclosed in glass and what part of it is open.

A. Well, if you had a piece of chalk, Mr. Wood, I would try and show it on the blackboard.

Q. I will give you something that you can make more permanent. Draw it on this piece of paper.

(Testimony of Earle B. Vaux.)

Mr. Young: Do you have any photographs, Mr. Wood, of the Pennsylvanian?

Mr. Wood: No, I haven't.

A. This represents looking down on the bridge, your Honor. This is what is known as the bridge; it is the wheelhouse, this [476] being the port side and this the starboard side, this representing windows in the forward end for vision; this is the wheel, the steering wheel of the helmsman and quartermaster, and this here being the chart room where the charts are kept and your——

The Court: Q. That little dot to the left there marks the door into the chart room?

A. This is the door here, yes, sir. that door is closed.

Q. And those two circles on each side are side lights? A. Side lights, yes.

Q. Are there doors out to the right and to the left from the wheelhouse?

A. There is a section across here with a sliding door which is kept open and also here a section of a sliding door which is kept open; in other words, so that we can walk from one end of the bridge to the other.

Q. Which are the open wings of the bridge?

A. This is the open wing of the bridge here and an open wing of the bridge on this side.

Q. You say it has windows; that implies it is closed. What do you mean by that?

A. Windows are in the wheelhouse only. There are no windows in the wing of the bridge itself.

(Testimony of Earle B. Vaux.)

There is a railing here that can be readily seen; it is, I should judge, four and a half feet height.

Mr. Young: I think the record is quite unintelligible as to [477] this particular diagram and I would like to request that the witness mark on the diagram the names of the various places he has just been testifying to and then have the diagram marked as an exhibit.

The Court: That can be done.

Mr. Wood: That is all right. I will mark it by agreement with you.

Mr. Young: Very well.

Mr. Wood: Suppose we call this port wing of bridge.

Mr. Young: What does the Captain say about that?

Mr. Wood: Well, that is what he said.

The Witness: I swear it is the port wing.

Mr. Wood: Mark this the starboard wing.

The Witness: Starboard wing.

Mr. Wood: Mark this the steering wheel.

The Witness: Wheel, yes.

Mr. Wood: Q. Mark this—what do you call it, the pilot house or enclosed part of bridge, or what—

A. It is the wheelhouse.

Q. That is enclosed? A. It is enclosed.

Q. Except that you have got windows that you can open and doors on each side. A. Yes.

Q. Wheelhouse. [478]

The Court: Q. Which are left open, he said; sliding doors which he said are left open.

(Testimony of Earle B. Vaux.)

Mr. Wood: Q. Is this where the door is, here somewhere?

A. No, the doors open up here, this section here.

Q. And the same up there? A. Yes, sir.

Q. Right there "door"? A. Yes.

Mr. Young: Q. Were those doors open the night of the accident? A. Yes, sir.

Mr. Wood: Q. Now, the wings of the bridge are open and the wheelhouse is enclosed, is that right? A. Yes, sir.

Q. This is the chart room, the rear?

A. That is the chart room. I could elaborate on that and bring the wings down but it is not necessary.

Mr. Wood: I think that is enough. Bring them out, you say?

A. The wings running down here on the side, but it is not necessary.

Mr. Wood: I offer that as Claimant's Exhibit, Vaux, 1.

The Court: Admitted.

(The drawing, so offered, was received in evidence as Claimant's Exhibit 10.)

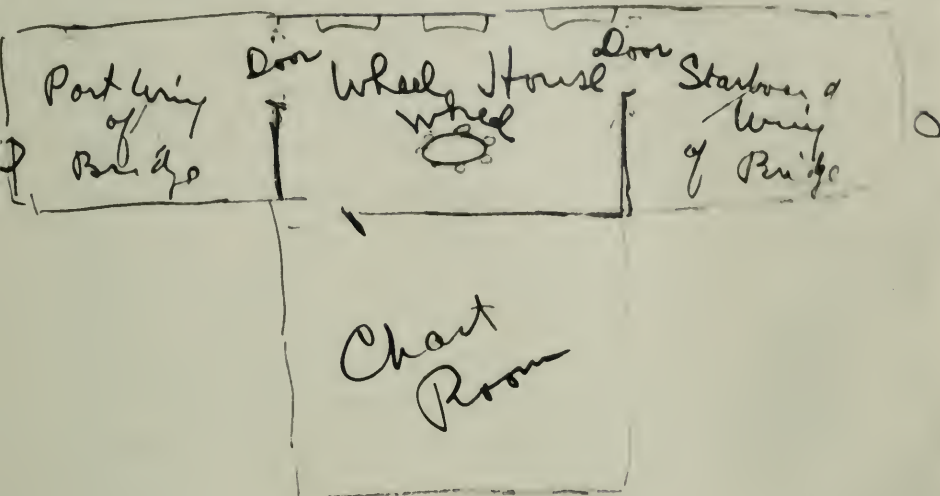
U. S. DISTRICT COURT
DISTRICT OF OREGON
FILED

JUL 23 1941

G. H. Marsh, Clerk

DEPUTY

Claimants	
EXHIBIT	10 Med
Cla. No. 727	OSCAR TAYLOR Reporter



No. 11,111
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED

NOV 30 1942

PAUL P. O'BRIEN
CLERK

(Testimony of Earle B. Vaux.)

Mr. Wood: Q. I am sorry to interrupt your narrative, Captain, but I thought we ought to clarify that. Will you go on now and tell what happened from the time you stepped out onto the wing [479] to be prepared to hear any whistle signals from the Barry "K".

A. At 12:50 the engines were full ahead. I did see the lights of a vessel towing that later turned out to be the Barry "K", that is, the two white lights of towing, that is, a red side light, which did bear approximately a quarter of a point on the port bow. About a minute later I heard one whistle and pilot Norberg remarked, he said, "One blast," and I says, "Yes, one blast," and shortly after the Pennsylvanian answered with one blast.

Q. Who blew the one blast from the Pennsylvanian? Who pulled the whistle cord, if you remember?

A. I can't be sure of that. I didn't blow the whistle, Mr. Wood. I believe it was pilot Norberg. I didn't hear any orders passed from Norberg to Nelson to do the whistling.

Q. How did that one blast from the Barry "K" sound; I mean was it distinct or confused, was it a plain one blast or was it something that you could have been mixed up about, or what was it?

A. There is no doubt in my mind whatsoever that it was clear and unmistakable and distinct as one blast.

Q. Well, then, your ship answered with one blast and then what happened?

(Testimony of Earle B. Vaux.)

A. Answered with one blast.

The Court: I will have to interrupt you again. Under the regulations and practice is one blast the same length as each of two blasts? [480]

Mr. Wood: I believe that the two-blast signals are two short blasts of the whistle and a short blast, I think, is supposed to be a second's duration, isn't it, Captain?

A. The regulations call for a short blast as of about a second's duration; a long blast four to six seconds.

The Court: Q. Four to six?

A. A long one is four to six; a short blast is one second.

Q. And you testified that this was definitely a long blast of four to six seconds?

A. No, sir, a short blast.

Q. You would say it was a short blast? I am not trying to make you say that it was two blasts but I am trying to get at the length. It wasn't like the usual one long blast? A. No, sir.

Mr. Wood: All right. There was a single blast?

A. Yes.

Q. Which you answered with one blast?

A. Answered with one blast.

Q. And then what was the course of your ship from then on; what was done?

A. The vessel was swinging off the Post Office range at that time. I knew it was Post Office range only by being informed that it was that particular

(Testimony of Earle B. Vaux.)

range, but being as it was, range lights, the name didn't mean anything to me. I knew it was ranges. The vessel was to the right of the ranges and favoring the right-hand [481] side and she was swinging off range. About a minute later, after the one blast from the Pennsylvanian answering, what turned out to be the Barry "K" showed a green side light.

Q. Up to that time she had been showing her red light?

A. Up to that time she had been showing her red light and even at that time there was nothing to be alarmed about. She might have taken a sheer at that time, temporarily out of control, that I didn't know and I don't know.

Q. Why do you say there was nothing to be alarmed about; are you referring to the distance away she was or what?

A. Yes, the risk of collision can be ascertained by carefully watching the compass bearing of the approaching vessel and if the bearing doesn't appreciably change, such risk of collision should be deemed to exist. At this particular point she was two points on the port bow and she had started to show her——

Q. You said when you first saw her you thought she was about a quarter of a point on your port bow. Now you say she was about two points on your port bow and I wish you would explain what would bring about that change.

A. Well, as I testified, the Pennsylvanian was

(Testimony of Earle B. Vaux.)

going off the range and to the right and as she went to the right it would open up that angle on the bow.

Q. Yes.

A. In other words, as the Pennsylvanian came down this channel here, making this gradual curve, the approaching vessel would, [482] because of the Pennsylvanian's curve, appear more on the Pennsylvanian's port bow.

Q. Well, then when you saw the green lights, did it raise any doubt in your mind as to the other vessel's course or intention?

A. I supposed that she had taken a sheer; that is the only thing that entered my mind at that time.

Q. What did you suppose she was going to do then?

A. I expected she would right herself and continue on her own side of the channel.

Q. Are those momentary or temporary sheers common things in navigation?

A. Yes, they are on every vessel, for the helmsman or whatever it happens to be that causes it.

Q. Could you give us an estimate of how far away she was when she first showed you a green light?

A. I wouldn't attempt to estimate her distance away at the actual time she started showing her green light, no, sir.

Q. Well, up to the time she showed her green light, had she blown you any danger signals?

(Testimony of Earle B. Vaux.)

A. No, sir.

Q. Was it after she had shown her green light for an appreciable length of time that you got the first danger blast?

A. I should judge it was about a minute, Mr. Wood, that the green light was visible, that she did sound a danger signal.

Q. What is your recollection of those danger signals? You heard [483] the Court ask Norberg whether they were in distinct groups or whether they were more or less all consecutive and jumbled up.

A. A danger signal consists of four or more short and rapid blasts and rapid blasts mean just as fast as a man can pull a whistle.

Q. I know—— A. It is an alarm.

Q. I know. I don't think you got my question. Were the danger signals from the Barry "K" a series of blasts and then an appreciable stop and silence, followed by a second group of blasts and the same thing and then a third distinct group of blasts or were they, as you remember it, not so divided into groups?

A. Well, I recall it as one distinct danger signal; then an appreciable period later; that is, just almost instantaneously before the actual impact; that is the only two that I recall of hearing, sir.

Q. Well, shortly before the impact you reversed full speed astern, did you not?

A. Yes, sir, shortly before the impact.

(Testimony of Earle B. Vaux.)

Q. And what signal did you give, if any, to indicate that fact?

A. The three whistles of the Pennsylvanian to indicate that her engines were running full speed astern.

Q. That is the statutory signal, is it not?

A. Yes, sir.

Q. And did the Barry "K" blow a similar signal, three blasts?

A. I don't recall of hearing those three blasts. [484]

Q. All right. Let's get back to the first danger signal you heard from the Barry "K" after she had shown her green light. When you received that danger signal, what did you do on your ship?

A. I didn't do anything.

Q. I don't mean you yourself; I mean what was done on your ship?

A. The first danger signal the engines had been put to slow and stop previous to that after the green light was visible and when the danger signal came through, it was understood as a danger signal, the engines were put full speed astern. I place that time in reference to the bell book, if they want the exact times.

Q. That is when the green light first appeared, you went half speed?

A. Half speed and then stop, one bell following upon the other. In the bridge bell book the times are kept to the nearest minute. Fractions of min-

(Testimony of Earle B. Vaux.)

utes are not logged in the bridge bell book; the engine room bell book they are.

Q. Is it your recollection that you put her at half speed and stop as soon as you saw this green light or an appreciable time afterwards?

A. Very shortly after, almost instantly but very shortly after.

Q. And then later you heard the danger signal and then you—what did you do then?

A. After the danger signal?

Q. Yes.

A. The engines were put full speed astern. [485]

Q. Well, when you put your engines full speed astern, do you know what your helm order was?

A. Immediately it was hard right.

Q. What effect did that rudder and the reversing have on your ship?

A. The natural tendency of a vessel going full speed astern will put her stern right to port and the bow will swing rapidly to the right and with a hard right rudder that force increases so that she does swing very rapidly at that particular order and condition.

Q. Did that happen at this time?

A. It did, sir.

Q. How close would you say you were to the right-hand side bank of the river at the time of the collision?

A. I couldn't judge that distance. It was at nighttime that it happened. I could not judge, but

(Testimony of Earle B. Vaux.)

I still wonder why the Pennsylvanian didn't go ashore, because the trees were visible there of the shoreline.

Q. Well, at the time did you have any apprehension that you were so close that you might go ashore, at the time of the collision?

A. At the time of the collision?

Q. Yes. A. Yes, sir, I did.

Q. You did not, however, ground, did you?

A. Not to my knowledge, she didn't. It would be astem, if it [486] was anything.

Q. Is it customary or a practice to keep a man on the forecastle head ready to drop anchors when you are going down the Willamette and Columbia rivers after you leave the city of Portland?

A. No, not after the city limits. The Chief Officer is dismissed from the forecastle head. Only a lookout is left there.

Q. Was the Chief Officer on duty at the time of the collision or prior thereto?

A. Just prior; he had just left the forecastle head after he was dismissed from the bridge after we left the city docks.

Q. You mean he was dismissed by you from the bridge but he was on the forecastle head?

A. He was on the forecastle head, yes, sir.

Q. That was sometime before the collision?

A. It is fixed as approximately five minutes.

Q. You said a seaman was on the lookout. Do

(Testimony of Earle B. Vaux.)

you recall whether he reported the lights of the Barry "K"?

A. I believe that one bell was struck or whatever it was. I don't know. I couldn't say.

Q. Well, his routine duty would be to strike a bell to indicate a vessel ahead? A. Yes.

Q. One side or the other?

A. True. [487]

Q. It is not the duty of the lookouts, however, in clear weather to report whistle signals, is it? A. In a fog, yes, sir.

Q. I said in clear weather. A. No, sir.

Q. Now, to get back to this whistle of one blast that you heard from the Barry "K", did you say that was shorter than the usual long blast that is given by ships?

A. It was one blast of the whistle, termed as one blast. It wasn't shorter than a short blast, no, sir.

Q. It wasn't what?

A. It wasn't shorter than a short blast.

Q. No, it wasn't shorter than a short blast, but was it—I thought you said it was shorter than the usual long blast.

A. As I recall it, it was shorter than the usual long blast.

Q. Now, that is what I wanted to get at. Was there anything about that shortness which gave any rise to any doubt or misunderstanding in your mind about the other vessel's course or intention?

(Testimony of Earle B. Vaux.)

A. No, sir.

The Court: I suppose this would be a convenient time, Mr. Wood, to adjourn before you go to another subject. We have just a few minutes left, or do you want to——

Mr. Wood: I just want to ask him something else.

The Court: While we are waiting, Mr. Young, give me again [488] the whistles that you claim were made, slowly.

Mr. Young: I have a chart of them, your Honor, that I will be glad to supply.

The Court: I don't want the chart.

Mr. Young: I mean I can give you them exactly as the evidence shows.

The Court: Don't you have it in mind?

Mr. Young: I don't want to make any mistake on them, because there are a number of them.

The Court: I don't want your chart; I want what you think the evidence shows to date according to your theory.

Mr. Young: The evidence to date, according to our theory, shows that the first whistle blown by the Barry "K" was two blasts of the whistle for a starboard to starboard passage, and that was answered by one blast from the Pennsylvanian, which is a port to port passage whistle——

The Court: You don't need to explain them; just give the orders.

Mr. Young: Next the Barry "K" sounded four

(Testimony of Earle B. Vaux.)

blasts; no answer; another four blasts—another two blasts from the Barry “K” and no answer; then four blasts from the Barry “K”; no answer; two blasts from the Barry “K”; next the Pennsylvanian sounded three blasts and finally the Barry “K” sounded three blasts.

The Court: All right; thank you. [489]

Mr. Wood: Q. Captain, I was a little confused by these whistles myself and my associate called my attention to the pilot rules on it.

The Court: You claim that the Barry “K” gave three starboard passing whistles and two danger signals?

Mr. Young: No, three starboard passing whistles, your Honor, and three danger whistles.

The Court: That isn’t the way you just called it.

Mr. Young: I beg your pardon; four danger signals.

The Court: That isn’t the way you just called it to me.

Mr. Young: Just a moment.

The Court: I think you will find the record, when you read it, is rather tangled about the whistles; that is why I am bringing it up now before the adjournment. The way you have just called it to me is two by the Barry “Q” answered by one.

Mr. Young: Yes.

The Court: Then four, two, and four, and two—no, going back to the first four again; four, two and four unanswered.

(Testimony of Earle B. Vaux.)

Mr. Young: Four, two—that is correct.

The Court: Then two answered by three.

Mr. Young: Right.

The Court: Then three by the Barry “K”?

Mr. Young: Right.

The Court: That is three starboard passing whistles and two danger whistles. That is two—it is two 4’s; that is a full [490] house.

Mr. Young: May I take time out for a moment?

The Court: No, don’t take it. I think you had better look over the whistle record during the week-end.

Mr. Young: There are a number of whistles blown; it is a little confusing.

Mr. Wood: Q. Captain Vaux, I think I understand your testimony, perhaps, but I am not sure it is clear. I want to clarify it. On page 18 of the Pilot Rules it defines short and prolonged blast, doesn’t it? A. Yes, sir.

Q. And it says a short blast of the whistle shall mean a blast of about one second’s duration?

A. Yes, sir.

Q. A prolonged blast of the whistle shall mean a blast of from four to six seconds’ duration?

A. Yes, sir.

Q. Now, the prolonged blast of a whistle is the fog signal, is it not? A. Yes, sir.

Q. That is on page 21, rule 12, is it not?

A. Yes, sir.

Q. That is in fog, a steam vessel under way

(Testimony of Earle B. Vaux.)

shall sound at intervals not more than a minute a prolonged blast? A. Yes, sir. [491]

Q. We have nothing to do with that. Now, what is the signal according to the rules when a vessel is going to pass port to port in a narrow channel?

A. Sound one blast of the whistle, meaning directing her course to starboard.

Q. And it is a short blast, is it not?

A. A short blast, termed as a blast.

The Court: Q. Termed the same as what?

A. Termed as a blast.

Mr. Wood: In other words, a single blast here for a port to port passage, if blown by the Barry "K", would have been a short blast, not a prolonged blast?

A. Yes, sir, it would have been a short blast and not a prolonged blast.

Q. And it was a short blast, a single short blast, that you heard, was it? A. Yes, sir, it was.

Mr. Wood: I think that is clear now. The rules I referred to, your Honor, are Rule IV, "When steam vessels are approaching each other head and head, that is, end on, or nearly so, it shall be the duty of each to pass on the port side of the other, and either vessel shall give, as a signal of her intention one short and distinct blast of her whistle"; that is for a port to port passage. The preliminary rule says the same. One short blast of the whistle signifies intention to direct course to own starboard. [492]

The Court: The ordinary listener would think

(Testimony of Earle B. Vaux.)

that the one blast for passing was longer than two for a starboard passing, just ordinary experience, it seems to me.

Mr. Wood: I take it, apparently, from the rules they are not. The one blast, according to the rules, is about of a second's duration for a port to port passage and for a starboard passage it is two blasts, each blast of a second's duration; is that right?

A. Yes, sir.

Mr. Wood: Do you want to adjourn now, your Honor?

The Court: If it is agreeable. You will have considerable more examination?

Mr. Wood: Yes.

The Court: Well, we had just as well adjourn now until Monday morning. Some of you may find it inconvenient to be here as early as we have been starting. We will start at nine o'clock.

(Whereupon at 11 o'clock A.M., an adjournment was taken to 9 o'clock A.M., Monday, July 21, 1941.) [493]

Monday, July 21, 1941, at 9 o'clock A.M., pursuant to adjournment, the following further proceedings were had:

Mr. Wood: If your Honor please, we are in a little bit of a dilemma about these pilots. One of the American-Hawaiian ships has to go down the river at ten o'clock this morning and the pilot can be back tomorrow morning and I think we will have

other testimony to consume the intervening time, but I would like to excuse one of these pilots now and let him take the ship down and be back here tomorrow morning.

Mr. Young: No objection.

The Court: All right.

Mr. Wood: Captain Norberg will take the ship down and be back tomorrow morning.

The Court: I think we will start early again in the morning, to make sure we can get through tomorrow.

Mr. Wood: I am willing to start as early as your Honor pleases, but I can't guarantee we will finish tomorrow.

The Court: What was your last remark?

Mr. Wood: I am willing to start as soon as your Honor pleases, but I can't guarantee we will finish tomorrow.

The Court: Well, it is all the more so then.

Mr. Young: May it please the Court, at the close of the session on Friday, your Honor was making inquiry as to what Captain Reed's testimony had been with respect to the number of [494] whistles, and I gave to your Honor the detail of what I understood his testimony to be about those whistles. Since that time I have checked that against the transcript of the testimony of Captain Reed and find it to be accurate. In other words, Captain Reed testified to three starboard passing whistles and to two danger whistles. And also to one full speed astern whistle. In addition, your Honor,

opposing counsel was inquiring for the pilot house log of the Barry "K" for January 31, 1941. I now have the log here and counsel is welcome to use it. This covers both the 31st of January, 1941, and February 1, 1941.

Mr. Wood: Captain Vaux was on the stand. I suppose he had better resume.

EARLE B. VAUX

resumed the stand and testified further as follows:

Direct Examination

(Continued)

Mr. Wood: I may be going over some of this a second time.

Q. Captain Vaux, after you heard the single short blast from the Barry "K", then you answered with one blast; at that time you said that the red light of the Barry "K" was showing to you?

A. Yes, sir.

Q. And I have forgotten where she bore off your bow; I think you said about dead ahead, but I am not sure. What was it?

A. At the time we picked up the Barry "K", she was approximately half a point on the port bow.

Q. By "picked up," you mean first sighted her, first saw her? [495]

A. Yes, sir.

Q. Well, then, with the exchange of whistles, did that position change materially?

A. It did change, yes, sir. She was farther on the port bow.

(Testimony of Earle B. Vaux.)

Q. Then when she swung and showed her green light to you, approximately how far apart were the vessels at that time, would you estimate?

A. At least a quarter of a mile, I should judge.

Q. Now, what did you do with the engines of your ship when that green light appeared?

A. The pilot ordered the engines to half speed and then stop, one bell following upon the other.

Q. Well, one bell following upon the other might mean immediately or it might mean with an interval between; which do you mean?

A. A slight interval between.

Q. How much of an interval?

A. A fraction of a minute.

Q. Yes. Now, you have already testified that when that green light first appeared, the vessels were far enough away that you regarded it as safe for her to swing——

The Court: Mr. Wood, pardon me. I suppose some mechanical considerations enter into the time within which they may follow a half speed with a stop?

Mr. Wood: Oh, yes.

The Court: I suppose what he means is that they stopped the [496] engines as quickly as they could.

Mr. Wood: Q. Is that what you mean, Captain? What do you mean when you say half speed and then stop? The Court wants to know whether that means you stopped as quickly as you could or what do you mean?

(Testimony of Earle B. Vaux.)

A. Yes, we stopped as quick as she could. On the telegraphs, your Honor, when they are rung to a slow or to a stop, whatever the bells may be, that telegraph is answered from the engine room and the order is carried out almost instantaneously.

The Court: Q. That isn't what I want light on. A certain situation develops and calls for stopping the engines in the judgment of the pilot; does he stop them or must he first reduce them to half speed?

A. He can stop them immediately, sir.

Mr. Wood: Q. Now, you have already testified, Captain, that when the green light of the Barry "K" first appeared, you thought it was just some temporary sheer of the vessel and that the ships were far apart, so you thought it was all safe, and she could resume her course; do you remember testifying to that? A. Yes, sir, I do.

Q. Now, if that is what you thought, why did you half speed and stop?

A. The idea in meeting a vessel is to slow down and in this particular instance it was to give her a chance to right herself without involving a situation that would call for drastic action. [497]

Q. Had you up to that time of your stopping your engines received any danger signal from the Barry "K"? A. No, sir.

Q. Well, when did you receive a danger signal from the Barry "K", the first one?

A. The first one. She had been showing green

(Testimony of Earle B. Vaux.)

for approximately a minute when the first danger signal sounded and at that time the Pennsylvanian's engines were stopped and when it was understood to be a danger signal, the engines were put full astern at that time and a hard right rudder was ordered at the same time.

Q. You say when you received the first danger signal the engines of the Pennsylvanian had already been stopped? A. Yes, sir.

Q. You are referring to this stop order that you have just been testifying to?

A. That is the one, yes.

Q. In other words, they continued stopped from that stop order until you reversed full speed astern, did they? A. Yes, sir.

Q. You said that you reversed full speed astern when the danger signal from the Barry "K" was understood to be a danger signal. There wasn't any doubt about its being a danger signal, was there?

A. There was no doubt whatsoever that it was a danger signal. [498]

Q. In other words, when you got that first danger signal, did you reverse your ship at once?

A. Yes, sir.

Q. What was the effect on the Pennsylvanian of that reversing full speed astern and hard right rudder?

A. The reversing of the engines alone has a tendency to throw the stern to port. In other words, the term you use, she backs to port, and when she

(Testimony of Earle B. Vaux.)

backs to port the bow swings to starboard and a hard right rudder with that condition she will swing very rapidly.

Q. How long a time would you estimate it to be from the time that you reversed your engines until the collision? A. A fraction of a minute.

The Court: Q. What would have happened——

A. (Continuing) Less than a minute.

The Court: What would have happened if he had put the rudder the other way? Would it have neutralized the natural——

Mr. Wood: Q. What would have happened if you had put the rudder the other way?

A. We would have gone right through the Barry "K", right amidships, I figured. She could have not broken her swing. She was swinging to starboard, with her engines going full astern; she would have a tendency to swing to the right herself, but she could never swing to port; she would have gone right through the Barry "K".

Q. You mean if you had put the rudder —— [499]

The Court: Q. It wouldn't do any more than straighten her up; is that what you mean?

A. I do not mean she could have been straightened up in that time.

Q. You do not believe?

A. I do not believe that she could.

Mr. Wood: Did you make an official report to the Inspectors of this collision?

(Testimony of Earle B. Vaux.)

A. Yes, sir, I did.

Q. Do you have it with you?

A. Yes, sir, I believe it is in my coat pocket.

Q. May I see it?

The Witness: May I get that? (Speaking to the Court.)

Mr. Wood: Q. You said just now that the interval of time between reversing full speed astern and striking was a fraction of a minute. That might mean fifty seconds or it might mean fifty-nine seconds. Can you be any closer than that?

A. Less than a minute. I should judge it would be closer to forty-five seconds than it would be to ten seconds.

Q. When you reversed full speed astern, did you give the required whistle signal to indicate that?

A. Yes, sir, it was three whistles, three blasts given to indicate the engines were running full speed astern.

Q. Did you hear the Barry "K's" three blasts?

A. I am not positive whether she blew or she didn't. I couldn't say. I don't recall hearing them. She might have. I didn't pay [500] any attention to it at that particular time.

Q. Was the Barry "K" blowing a good many whistles during this last interval of time just before the collision?

A. It seemed to me, yes, sir, the second danger signal was the one that remains more sharply in my mind, that it was almost instantly before the impact itself. She was very, very close aboard.

(Testimony of Earle B. Vaux.)

Q. You have navigated many harbors and rivers and entrances all over the Atlantic and Pacific coasts, have you not? A. Yes, sir.

Q. Have you been to other parts of the world or just the United States?

A. Yes, sir, on the oriental run.

Q. What is your opinion as to whether or not in this Post Office Bar channel, with the width of approximately 800 feet, thirty feet deep, say 700 feet wide, thirty-five feet deep, as to whether or not it is safe and practicable for this tug and tow, as she was made up, and your ship to have passed there port to port?

A. I consider it perfectly safe and practicable for that to happen.

Q. Safe and practicable for your ship alone or for both ships?

A. Both of them, sir. I see no hazard involved in keeping their own side of the channel.

Q. What can you say as to the advantages of this rule to pass to [501] the right in giving pilots a reliance on the certainty of what the other ship is going to do? What can you say about that?

A. I don't believe I fully understood your question.

Q. What advantages does Article XXV give in being certain and definite so that you know what the other ship is going to do, especially at night-time in a channel?

A. Well, if vessels did not keep to their own

(Testimony of Earle B. Vaux.)

right side of the channel, you wouldn't know what they were going to do, if they didn't follow the pilot rules. It would be a question of doubt each and every time that you met anybody there.

Mr. Wood: You may cross examine.

Cross Examination

By Mr. Young:

Q. Captain, as a matter of fact, though, in any particular narrow channel, isn't it true that there are local practices which from time to time vary and that you as the pilot are required to give cognizance to those local practices?

A. Yes, and if the practice is known generally by a written report of the customs of that particular place, yes, sir.

Q. As a matter of fact, one reason why you use special pilots in operating in these narrow rivers is that those special pilots are more familiar with local conditions than you as the Master of the ship would be; isn't that true?

A. If that particular—Yes; yes, sir, that is true, but the captain of the ship is notified of these local rules as well as [502] the pilot. They are posted; they are known.

Q. Well, to what extent have you made it your business to become familiar with any local practices that may exist on the Willamette or Columbia rivers which are peculiar to those rivers as distinguished from other rivers?

A. I don't recall anything unusual, sir.

Q. Pardon?

(Testimony of Earle B. Vaux.)

A. I don't recall anything unusual.

Q. You don't recall anything unusual?

A. No, sir, I don't.

Q. Did you ever make any check to determine whether there are any practices with regard to river boats making starboard to starboard passages anywhere between Portland and the mouth of the Columbia River?

A. I never had the occasion, no, sir.

Q. You never had occasion to? A. No, sir.

Q. You yourself have never actually piloted an ocean-going ship down the Columbia River nor through the Columbia, have you?

A. I have no license for that, no pilot license.

Q. That is one reason why Captain Norberg was the one piloting the ship at that time; isn't that true?

A. Or any river pilot, yes, sir.

Q. Or any river pilot, yes.

A. Yes, sir. [503]

Q. You testified, I believe, that you have had about a year to a year and a half's experience as a Master; is that correct?

A. Up to the time of the accident, yes, a year and a half.

Q. And during that period of time, how frequently would you say you have been in the Willamette River?

A. Twice; every two months and five days. That is about a scheduled run. That would be about the figures.

(Testimony of Earle B. Vaux.)

Q. And when your ship was proceeding through the Willamette River, were you always on the bridge?

A. Yes, sir, I was always on the bridge.

Q. Prior to the time that you became a Master, had you had occasion to travel over the Columbia and Willamette Rivers in any other capacity than Master?

A. Yes, sir.

Q. What was that capacity?

A. Chief Officer, nine years.

Q. For nine years. Then you have quite frequently been up the Willamette while a Chief Officer?

A. Yes, sir.

Q. During that period did you have occasion to familiarize yourself with the various peculiarities of the channel in the Willamette River from Portland, let us say, to the Columbia?

A. Not particularly, no, sir.

Q. Not particularly. You have testified, Captain, that when you first saw the Barry "K", you saw her red light; is that correct? [504]

A. That is correct.

Q. Which meant to you, I take it, that you were looking at her port side?

A. Yes, sir.

Q. Now, at the place where you saw that red light, do you recall that on the east side of the river there is a big long sweeping bend?

A. Yes, sir.

Q. Do you know what your geographical direction was at the time that you saw that red light?

(Testimony of Earle B. Vaux.)

A. I am not familiar with the courses in the river, Mr. Young.

Q. Well, you testified, I think, that you were just coming off Post Office range?

A. Yes, sir.

Q. Does not Post Office range tend over toward the west side of the river?

A. I have not—I have no pilotage for the Columbia River; I couldn't under oath swear that it did or it didn't.

Q. In any event on your east side of the river at the time that you saw this red light, you do remember there was a bend there, don't you?

A. Yes, sir. Pardon me, Mr. Young; may I have that chart for reference?

Q. I will be glad to have you step down to the chart. Just step down to the chart, Captain, to Libellant's Exhibit 2. Now, you [505] observe in examining this chart there is a long curve of the river; is that correct? A. Yes, sir.

Q. And you see the line here which indicates Post Office range? A. Yes.

Q. Now, as I understand, you were just coming off that range when you saw the light of the Barry "K"? A. Yes, sir.

Q. Now, could you indicate on this diagram about where you think you were when you saw the light of the Barry "K"?

A. Yes, I could indicate about where we saw it.

Q. Just indicate, if you please.

(Testimony of Earle B. Vaux.)

A. The blue line there is a close approximation.

Q. The blue line; you are referring to the blue cross?

A. Yes, the blue cross; it is a close approximation, yes, sir.

Q. Would you think that the blue cross that I am now pointing to would be a close approximation of the position of the Barry "K"?

A. I don't know. Whether she was east side or the west side, I couldn't say.

Q. Well, Captain, in any event it was obvious to you, wasn't it, that a boat coming upstream, as the Barry "K" was, you would naturally see the red light first, wouldn't you, from your position when you first observed it, because of the existence of this long curve in the river; isn't that true?

A. Yes, I believe you could see the red light first and her towing [506] lights.

Q. When you first saw the Barry "K" then and saw this red light, there was nothing about that that was surprising, was there?

The Court: The Captain had better come back to his chair.

A. We would expect to see a red light. That is true. But I should judge she could be showing the green side light, if she was hugging the bank up there at nighttime.

Q. Well, at least it wasn't surprising to see the red light of the Barry "K", because of the existence of that curve in the stream; isn't that true?

(Testimony of Earle B. Vaux.)

A. Not because of the curve of the stream, no, sir; you would expect to see a red light on the wrong side of the channel.

Q. You would what?

A. You would expect to see a red light on the wrong side of the channel.

Q. But I am asking you, even though with the Barry "K" on the east side of the stream, in view of the fact of that bend in the stream, you would necessarily have to see the red light first from the position you were in in going off Post Office Bar; is that not correct?

A. No, I don't believe it is. I think you could see her green side light if, when the Pennsylvanian was coming off the range, she was hugging that side closer to her in the position and the angle she was in, I do believe that you could see a green side light. [507]

Q. As a matter of fact, wasn't the Barry "K" in a position where, but for the bend in the river, if she kept on going straight ahead, she would be crossing your bow from your right to your left?

A. Will you please repeat that?

(The last question was read by the reporter.)

A. If she was showing a red light, she would, yes, sir; she would be crossing the bow.

Q. Now, as your ship came nearer to the Barry "K" and she came nearer to you, if she were following the thread of the stream, she would tend then to swing around more into the position where

(Testimony of Earle B. Vaux.)

you would at some stage for the first time see the green light; isn't that true?

The Court: What do you mean, thread of the stream?

Mr. Young: Well, following—I mean the course of the stream——

The Court: Following the bend?

Mr. Young: Yes, following the bend.

The Court: You will have to restate it. Take that word “thread” out of it.

Mr. Young: I will do that.

Q. Is it not true, Captain, that as the Barry “K” would be coming upstream following the bend, you would naturally expect a little later then to see the green light?

A. Which bend, Mr. Young?

Q. The only bend that we are talking about, the bend in the [508] river which the Barry “K” was proceeding around at the time that you first saw her; is not this a bend to which I am pointing?

A. The way your pointer is, I don't know whether it is the inside bend or the outside bend.

Q. The Barry “K” was, you said, in the position as indicated by this blue cross mark to which I am now pointing; is that right? A. Yes.

Mr. Wood: He didn't say that; he said he couldn't say.

Mr. Young: Q. Did I understand that you did or did not agree that you thought the Barry “K's” position was substantially where that blue cross mark puts it or not?

(Testimony of Earle B. Vaux.)

A. I told you I couldn't judge.

Q. Irrespective of which side of the stream the Barry "K" was on, in view of the fact she was rounding this bend, coming toward you, wouldn't it be true that you would first see her red light normally and then a little later see her green light?

A. I don't believe so, no, sir.

Q. Well, why not?

A. If she was hugging close in on the wrong side of the channel, it would be the green light.

Q. Captain, as you get down into the bite of this curve, the channel tends to straighten out a bit, doesn't it?

A. I had no pilotage, Mr. Young.

Q. I am asking you to look at the map, though, if you will, please. [509]

A. Yes, sir.

Q. And as the ship in following the curve and straightening out at that particular point—it would tend to be coming more head-on and head towards you, wouldn't it?

A. No, it wouldn't.

Q. It would not?

A. I shouldn't think so.

Q. Perhaps you don't understand my question, Captain. Let me go back just a moment. Assuming that the Barry "K" were in the position approximately where that blue cross mark is——

A. Yes, sir.

Q. ——and you were approximately in the position where the other blue cross mark is just coming off Post Office range——

A. Yes.

Q. ——and your general direction at that time

(Testimony of Earle B. Vaux.)

tends toward the left or bottom side of this map and the Barry "K's" general direction tends to the same place on an angle, an oblique angle, doesn't it?

A. We wouldn't be tending to the left, Mr. Young; we would be swinging and tending to the right.

Q. You were swinging and tending to go to the right? A. Yes.

Q. But for a time while you were on Post Office range you were tending toward the left so far as the course of the stream is concerned; isn't that right? [510]

A. We were leaving Post Office range.

Q. You were leaving Post Office range. As the Barry "K" is coming upstream, whether she is on the east or on the west side of that stream, isn't it true that she first tends to show her port side to you and then as she gets farther upstream, because of the curve she tends to swing around so you can see her starboard side; isn't that true?

A. No, sir, I shouldn't judge that it was.

Q. What is the answer?

A. I don't believe it is.

Q. You don't believe it is. You testified that when you first saw the green light of the Barry "K", you thought she had taken a sheer?

A. Yes, sir.

Q. What does the word "sheer" mean?

A. To be temporarily out of control.

(Testimony of Earle B. Vaux.)

Q. What causes a ship to take a sheer?

A. Various things.

Q. For instance. A. Steering.

Q. Steering?

A. Yes, sir. Putting the wheel one way and then letting her take ahead too rapidly and trying to get her back or put her wheel hard the other way; she will have a tendency to sheer.

Q. Was there anything at that particular place to suggest to you [511] the Barry "K" should be getting out of control?

A. I didn't know what she had; I mean I couldn't judge.

Q. You said, however, that although you thought she might be taking a sheer, which you now say means getting out of control, you saw no reason to be alarmed? A. No, not at all.

Q. How did you know at that time how long it would be before the Barry "K" would recover from this sheer?

A. Well, in other cases of vessels taking a sheer, they right themselves in a very reasonable length of time.

Q. What do you mean by reasonable length of time?

A. Well, in this particular case the Barry "K" and the Pennsylvanian were both, I should judge, in safe position. I mean there wasn't any danger, nothing to become alarmed about. If she did take a sheer, that could be controlled and no doubt I expect that she would be controlled.

(Testimony of Earle B. Vaux.)

Q. However, this sheer which you testified to meant she was going across your bow, didn't it?

A. No.

Q. It did not?

A. It meant that the vessel had swung off her course.

Q. Well, at least while she had swung off her course, her direction was across your bow, wasn't it?

A. Her head would be pointing that way, yes, sir.

Q. That is what I mean. [512] A. True.

Q. And geographically that meant that her head was tending to point toward the east shore at that point of time; is that right? A. Yes, sir.

Q. Well, if the head continued to remain in that position, that was a matter of interest to you in the piloting of the ship, wasn't it?

A. Yes, that is why the engines were put at half speed and stop, Mr. Young.

Q. What I don't understand, however, was your statement that there was no occasion to be at all alarmed. A. True.

Q. When you thought the Barry "K" was out of control. A. True.

Q. If she didn't get out of this sheer, however, there would be something for you to be alarmed about, wouldn't there? A. Yes, sir.

Q. What were all of the lights that you observed on the Barry "K" when you first saw her?

A. When I first saw her?

(Testimony of Earle B. Vaux.)

Q. Yes.

A. The two white towing lights and her red side light and brilliant white deck lights.

Q. What did those two white towing lights mean to you? A. That it was a vessel towing. [513]

Q. What sort of a tow?

A. Towing alongside.

Q. Towing alongside? A. Yes, sir.

Q. You knew that she did not have a log raft behind then, didn't you?

A. Yes, sir, I knew that.

Q. Now, you mentioned that you saw white deck lights? A. Yes, sir.

Q. Were they quite brilliant?

A. They were very brilliant, Mr. Young.

Q. When you say deck lights, what do you mean?

A. Lights about the deck, passageways; I am not familiar with the Barry "K" or her actual construction, but I term deck lights—as deck lights, lights about the deck used on the overhead generally or on the bulkheads, that reflect.

Q. How many of these lights did you see?

A. They couldn't be counted. I mean one doesn't count lights. It is more of a glare from a series of lights.

Q. In other words, there was a whole series of white lights that you saw; is that correct?

A. Deck lights, yes, sir.

Q. You were not able to distinguish separate lights on the deck?

(Testimony of Earle B. Vaux.)

A. I couldn't and wouldn't.

Q. How high did those lights appear to be above the level of the [514] water?

A. I couldn't judge.

Q. Did those lights remain on continuously down until the time of the accident?

A. Well, I didn't pay particular attention to her bright deck lights at the time of the impact or collision.

Q. During all of the time that you were watching her, however, did you notice whether those lights were continuously on?

A. I didn't take particular notice after I had convinced myself that she was a tow boat.

Q. Did those lights assist you or not in determining the position of the Barry "K"?

A. No.

Q. Did not?

A. They did not assist. I am still speaking of deck lights, now, Mr. Young.

Q. I understand; the deck lights, yes. At the time that you thought the Barry "K" was taking a sheer, did you mention that to the pilot?

A. I don't recall any reconversation due to the fact that the telegraphs were rung and I was standing outside at the time. I could see the telegraphs and knew what was going on.

Q. When you heard the first danger signal from the Barry "K", did you understand any reason why there should be a danger signal?

(Testimony of Earle B. Vaux.)

A. I didn't, no, unless he had broken down or something had [515] happened.

Q. You couldn't interpret the signal except that it was a danger signal?

A. As a danger signal, yes, sir.

Q. What is the maximum speed which the Pennsylvanian can attain?

A. Well, I don't know whether you are speaking of light draft, half loaded or full draft or what she is.

Q. Well, suppose her loaded as she was at the time of this accident, what would be her maximum speed?

A. I believe she could work herself to twelve knots, yes.

Q. Twelve knots? A. Yes.

Q. And at the time that you first were coming off the Post Office range, what would you say her speed was?

A. I couldn't judge what her speed was, Mr. Young.

Q. Do you know what the maximum speed she attained was at any time before the collision occurred?

A. The maximum speed that she attained before any bells were rung on the——

Q. Yes.

A. I believe I could approximate close to it; I couldn't swear to that speed.

Q. What would you approximate then?

(Testimony of Earle B. Vaux.)

A. I believe she had worked up to seven and a half or eight knots. [516]

Q. And at the time that the vessel was put full speed astern, what would you say her speed then was?

A. Well, the engines were half speed and then stopped and put full speed astern, sir.

Q. When the engines were put half speed, that cut down her speed somewhat, didn't it?

A. Yes, sir.

Q. How much was the speed reduced by putting the engines at half speed before you put them full speed astern?

A. Well, due to the fact that she had not attained her full speed, it would be very hard to judge just exactly what her speed was and how much it was reduced after the engines were put at half speed and stopped.

Q. Well, you don't know then?

A. I couldn't swear, no, sir.

Q. And you wouldn't undertake to say what her speed was at the time that you put the engines full speed astern?

A. I should judge it would be four knots.

Q. Four knots?

A. Between four and four and a half knots. That is a close approximation, I believe.

Q. And what would you say was the distance between the Barry "K" and the Pennsylvanian at that point of time?

A. I could not judge.

(Testimony of Earle B. Vaux.)

Q. How fast would you say the Pennsylvanian was traveling at the [517] time the collision occurred?

A. The actual impact?

Q. Yes.

A. I should judge three and a half or four knots.

Q. Three and a half—

A. Between three and a half and four. That is the best I can do. It is a close approximation.

Mr. Young: That is all.

Redirect Examination

By Mr. Wood:

Q. I would like to ask some questions I overlooked asking. On this matter of lights that Mr. Young was asking you about, you said you saw the deck lights of the Barry "K's" house?

A. Yes, sir.

Q. Did you see prior to the collision any lanterns on the barges?

A. No, sir, I did not.

Q. After the collision, did you see any lanterns on the barges?

A. After the actual impact and when I ordered the searchlight turned on, I did, yes, sir, but I wasn't looking for lights; I will guarantee you that. I was looking for survivors. We found there was no survivors; there was nobody aboard the barges and I sang out to the tug Cruiser, which had arrived on the scene approximately fifteen minutes after the actual impact, if there was anybody aboard there or if he was all right and he claimed there was nobody aboard and he was all

(Testimony of Earle B. Vaux.)

right, he would take care [518] of him. And I did put the search light on the barges and drew to the attention of the Third Mate who at that time was standing alongside there—I was handling the search light myself—and the pilot, to note closely at that time a lantern that was on the barge 22.

Q. Where was the lantern?

A. The lantern was on the deck of the barge, which later proved to be closest to the stem of the Barry "K". There was a street construction lantern, the same thing as you see on a sign when it says "Detour," that type of lantern.

Q. It wasn't, then, this type of lantern?

A. No, sir, it was not that type of lantern. It was a tall—I think, if I recall the name correctly, it is Dietz, is the name they go under, for Dietz Construction.

Q. Was it hanging up on the corner of the house of the barge?

A. It was absolutely not hanging on the corner; it was sitting on the deck, sir.

Q. About how high above the water?

A. I don't know how high the Barry "K"—the barge 22 was above the water, but it was on the deck.

Q. Was it bright or dim?

A. No, sir, it was dim. I didn't pick it up until I put the searchlight on it. Incidentally, the searchlight on the Pennsylvanian is a new Sperry type search light, which is very powerful. It can sharpen things out a good deal. [519]

(Testimony of Earle B. Vaux.)

Q. Do you know whether this lantern was burning or not; could you tell that?

A. It appeared to be burning.

Q. How far away were you from her at that time?

A. The collision had taken place; the Pennsylvanian was on a backing bell, and the Pennsylvanian had left the barge 22, the actual running into the barge herself, she had got herself clear from that, I should judge it must have been all of 150 feet.

Q. From where you were to the lantern?

A. Yes, sir.

Q. Could you tell—I don't know whether you could or not—at that distance and that light whether the lantern was smudged or dirty or not?

A. I couldn't say. It certainly wasn't sparkling bright.

Q. Did you see any other lanterns on the barges?

A. I saw no other lanterns, Mr. Wood.

Q. Will you please explain to the Court what the purpose of a vessel's range lights are?

A. The range lights—you are speaking of a steam vessel?

Q. Yes.

A. Range lights of a steam vessel are used to designate her course, her angle, that she is either open or closed. In other words, if the range lights are directly in line and the green and red side lights were showing, you would know that the vessel was coming directly towards you, and if the

(Testimony of Earle B. Vaux.)

lower range [520] or the mast headlight was open, you knew that there would be an angle between that and that the vessel would probably—would clear; you would know the angle that she was heading at, the course. The after range is fifteen feet higher than the mast head light.

Q. Should be according to the regulations?

A. It should be.

Q. Do those range lights on a vessel enable the opposing navigator to tell the angle of that vessel's approach better than if he just saw the side light of the approaching vessel?

A. Yes, sir, very much.

Q. Why is that?

A. That the range lights——

Q. Why do the range lights enable the opposing navigator to tell the other vessel's approach with more accuracy than if he just saw the red light alone?

A. Well, he would determine what it was. With range lights he would know it was an ocean-going steamer and if the range lights were open, he would know the course she was on.

Q. The range lights aren't confined to ocean-going steamers, are they?

A. No, they are not confined to ocean-going steamers. You can readily tell, probably, by the height of the lights whether she was an ocean-going steamer or not.

Q. Were the helm orders on the Pennsylvanian promptly and [521] correctly obeyed?

(Testimony of Earle B. Vaux.)

A. Yes, sir, they were. I can see from where I am standing outside on the wing of the bridge—there is what we call an indicator arrow aft and that, too, can be seen, which way the helm is put, whether it is amidships or hard over to one way or another. And if I am inside, I can see it.

Q. You could also tell from the vessel's movements whether she was doing what you wanted her to?

A. You could tell by her head what she was doing.

Q. Were the engine room orders obeyed promptly and correctly?

A. Yes, sir, they were. The telegraph was rung and answered.

Q. The vessel maneuvered then in accordance with the orders given on the bridge?

A. She did, yes, sir.

Q. Did you have a lookout stationed?

A. Yes, there was a seaman on the forecastle head as lookout.

Q. Is either that lookout or the helmsman with the ship now?

A. No, sir, they are not. Seamen very rarely stay more than half a trip, at least a full trip, nowadays. They are always changing from ship to ship and company to company.

Q. I forgot to ask you this: When the Barry "K" blew her one blast, did or did not pilot Norberg confirm that by asking you what you heard or did you speak to him about it?

(Testimony of Earle B. Vaux.)

A. I heard the blast and directly after pilot Norberg remarked, "One blast," and I confirmed and I did agree that it was one [522] blast. It is a custom for the pilot to make those remarks. I mean if it was one blast, he would say, "One blast," and either the Captain of the ship and the officer on watch, either would agree or would not agree as to what they heard.

Q. That is what I was going to ask you, whether that is the regular practice or not?

A. It is on American-Hawaiian ships, yes, sir, the same as it is for the Captain to be there all the time going up and down this river, or any river, or any harbor, to be on the bridge at all times.

Q. Was there any doubt in your own mind about what this blast was from the Barry "K"?

A. Never at any time.

Q. This official report of yours is a copy only, is it not?

A. That is a carbon copy, yes.

Q. It is a true copy, though, is it not, of your report; it is a correct copy?

A. Yes, I typed it.

Mr. Wood: I am going to offer it in evidence, your Honor, merely as a consecutive narrative of his present testimony.

Mr. Young: The document is objected to, your Honor, upon the ground that it is purely self-serving and is not admissible in favor of the party offering it.

(Testimony of Earle B. Vaux.)

The Court: I will reserve the ruling.

(The report, so offered, was marked Respondent's [523] Exhibit 11 for identification.)

RESPONDENT'S EXHIBIT No. 11
FOR IDENTIFICATION

WLCB

AMERICAN-HAWAIIAN STEAMSHIP
COMPANY

Operating Department

Cable and Radio

Address

Amhawaii

M. S.

S. S. Pennsylvanian Voy.

87 W. B.

Written at Portland, Oregon.

Date February 1, 1941.

Subject, Collision.

Bureau of Marine Inspection & Navigation
Captain Arthur Joachims, Local Inspector,
Portland, Oregon.

Dear Sir:

I regret to report a collision between Western Transportation Barge #22, being towed by tugboat 'Barry K' at 12:55 A.M. this day Feb. 1, 1941 at Post Office Lower Light in the Willamette River. The Pennsylvanian was considerably damaged about the bows and I understand the barge and her cargo is also damaged. There were no personal injuries

(Testimony of Earle B. Vaux.)

and both my vessel and the barge were able to reach this port and are now here.

The Pennsylvanian Capt. Earle B. Vaux, Master and Pilot John Norberg left Pier 'A' Portland at 12:03 A.M. this day bound for Astoria. Weather overcast—visibility good—calm and smooth, tide ebbing. Vessel proceeded down river passing through R.R. Bridge at slow speed. At 12:39 engine at half speed passing under St. Johns Bridge. At 12:50 A.M. Full ahead sighted a towboat approximately half a point on port bow showing regulation towing lights (white) and red side light with brilliant deck lights. About a minute later the towboat blew one blast on her whistle, which was understood by Pilot Norberg and by me to be a passing signal and that he (the towboat) was passing 'port to port'. This vessel answered with one blast, and continued down stream well on her right-hand side of the channel. As we approached closer, the 'Barry K', which had up to that time been showing her red light, showed her green side light, and shut out the red. She was still far enough away, however, to resume the port to port passage. Nevertheless, as soon as we saw her green light, we slowed to half speed and stopped, the stop order following immediately on the half speed. The bridge bell-book entry for this is at 12:54 A.M., which, however, is only to the nearest minute. Shortly after we had stopped our engines, the 'Barry K' sounded several short and rapid blasts, understood by us to be the danger sig-

(Testimony of Earle B. Vaux.)

nal, and we immediately put our engines full astern and wheel hard right, and Pilot Norberg sounded three short blasts of the steam whistle to designate engine running full astern. This is recorded in our bell-book at 12:55 A.M., which, again, is only to the nearest minute. After a short period going with engines full astern and rudder hard right, we collided with Barge #22 of the Western Transportation Company. Though the collision is recorded

AMERICAN-HAWAIIAN STEAMSHIP
COMPANY

Operating Department

Cable and Radio

Address

Amhawaii

M. S.

S. S. Pennsylvanian Voy.

87 W. B.

Written at Portland, Oregon.

Date February 1, 1941.

Subject, Collision.

Bureau of Marine Inspection & Navigation

Captain Arthur Joachims, Local Inspector.

#2.

in the bridge bell-book, to the nearest minute, at 12:55, the interval between reversing full speed astern, rudder hard right, and the collision was considerable.

Called through megaphone to tugboat asking if

(Testimony of Earle B. Vaux.)

he was all right or needed assistance. He answered he had a broken oil-line. At about 1.10 A.M. tug-boat Cruiser bound up river went to the Barry K and then came alongside to pick up the two barges that were drifting. Asked Cruiser if he needed any assistance and if anyone aboard barges, to which he replied, 'No'.

Bilges and fore peak tank showed no change and at 1:23 A.M. proceeded toward Astoria. At 1.52 A.M. repeated soundings showed that vessel was making water in the forepeak tank (used for fresh water). Stop-turned around and proceeded to return to Portland and began pumping from fore peak. Vessel docked Portland 4.10 A.M. this day.

In my own statement and firm belief the towboat Barry K. and her tow of two barges failed to keep her right side of channel after blowing one blast; also tow improperly and inadequately lighted.

Respectfully submitted,

E. B. VAUX,

Master

S. S. Pennsylvanian.

I concur in the foregoing statement.

Pilot.

[Endorsed]: Filed Jul. 23, 1941.

Mr. Wood: Q. Captain, from the time you saw the Barry "K" and heard her blast and answered

(Testimony of Earle B. Vaux.)

it, were you giving your attention from that time on to the approaching ship and observing her movements? A. Yes, sir, I was.

Q. Now, there has been a great deal of testimony here why a tow boat shouldn't come up on the right-hand side. I will ask you why an ocean-going steamer going down the river should not go down on the left-hand side in that place?

A. It would be a direct violation of pilot rules. There is a number of reasons.

Q. What are some of them?

A. If the vessel is keeping to the left and hugging that particular bank and the tide was ebbing, the current was ebbing, if anything went wrong with the Pennsylvanian she would go ashore, she would go aground. If it was necessary to reverse her engines at any time, her stern would back to port, which would throw her stern up into the bank——

The Court: Q. Bow, wouldn't it be?

A. No, she would back to port if she was on the left-hand side of the channel, running down, her stern would back to port if it was necessary to back the engines, your Honor.

Mr. Wood: Q. How would that throw her head——

A. It would throw her head directly across the channel to the [524] right.

Q. Suppose she was going to the left and an upcoming ship was coming up on that ship's left.

(Testimony of Earle B. Vaux.)

in other words, a starboard to starboard passage, and the Pennsylvanian had to suddenly back, what effect would that throwing her head to the right have on increasing the risk of collision?

A. Well, there is no doubt there would be a collision right then and there, because you are blocking the channel as the vessel is coming up and the current is running down, it is settling you down any way.

Q. Is it easier to handle a ship against the current or going with the current?

A. It is easier to handle against the current. It doesn't have the effect on the stern.

Q. Are there any other reasons? You said there were several reasons. You have already given several, but are there any more?

A. I can't think of any, sir.

Q. Now, some mention was made by Mr. Young in earlier testimony about dropping anchors. What have you to say about that? I will ask you first whether it is the practice or customary to keep an officer on the forecastle head for the purpose of dropping anchors in clear weather, going down the Columbia River after you have left the city limits, or Willamette or Columbia Rivers?

A. Never.

Q. Is there any occasion for doing that? [525]

A. No. In case of thick weather—and they have quite a bit of it around here; fog—you do keep a man there for that purpose, because you do get

(Testimony of Earle B. Vaux.)

an anchor down to wait until weather clears, but for meeting ships and for that reason, never, no, you don't keep anybody there after the city docks.

Q. Suppose you did go down there in that channel, say at seven knots, and you had to drop your anchor, what would be the effect—not if you had to drop your anchor, or if you did drop your anchor, what would be the effect?

A. She wouldn't fetch up.

Q. What would she do?

A. She would just keep going and sheer; that is what she would do. She would never fetch up and stop.

Mr. Wood: I think that is all. If anything later on occurs to me, I will ask leave to recall him.

Recross Examination

By Mr. Young:

Q. Captain, how many anchors do you have on the forward part of the *Pennsylvanian*?

A. Three.

Q. And where are they located?

A. Port bow, starboard bow, spare.

Q. Who is it that drops those anchors under orders from the bridge?

A. A licensed deck officer or anybody would drop them; the [526] lookout would drop them.

Q. Do you have anybody on the *Pennsylvanian* whose particular job it is to handle the anchors?

A. The Chief Officer is in charge of the running of the—

(Testimony of Earle B. Vaux.)

Q. But can any other member of the crew drop those anchors if there is occasion to do so?

A. Do they or can they?

Q. Are they permitted to do that?

A. Under orders they do it.

Q. Where was the chief officer at the time of this accident?

A. In his room. He had just left the fore-castle head, after we had left the city docks.

Q. When you say the city docks which docks do you mean?

A. I understand the city docks to be Terminal 4.

Q. Terminal No. 4? A. Yes.

Q. Just below St. Johns?

A. That is the term I use, that I am familiar with.

Q. Had the Chief Officer been on the fore-castle head until you got down to terminal No. 4?

A. Yes, Mr. Young.

Q. Why was he there?

A. Passing through the bridge mostly.

Q. Did he have any duties in connection with the anchors in going down through the harbor?

[527]

A. They are always ready and standing by in case of an accident, of failure of engines and vessels backing out of a dock and——

Q. In other words, in case of any emergency occurring, until you got down to Terminal No. 4 the Chief Officer was there to drop the anchors if there was occasion to; is that right?

(Testimony of Earle B. Vaux.)

A. It is a practice, yes, to have them standing by.

Q. I say, suppose that some danger had arisen farther upstream, above Terminal No. 4, rather than below Terminal No. 4, and the Chief Officer were on the forecastle head, if you ordered him to drop the anchors he would drop them, wouldn't he?

A. If we wanted them dropped, yes, or the carpenter might drop them.

Q. However, from Terminal No. 4 on down stream there was nobody on the forecastle head that could have dropped the anchors even if you wanted them dropped; isn't that right? A. No.

Q. What? A. No, it isn't right.

Q. Who was there?

A. There was a lookout there that could drop the anchor if he was told to.

Q. Had the lookout ever dropped the anchors?

A. I never questioned him, Mr. Young, if he had ever dropped an anchor or not. It doesn't take a great deal of ingenuity to open up a compressor and let an anchor drop. A man doesn't have [528] to be so well versed and educated in order to open a compressor to drop an anchor.

Q. Exactly what was the rating of this lookout? A. Seaman.

Q. He was a seaman? A. Yes.

Q. Was he an ordinary seaman?

A. Yes, sir.

Q. Isn't it true that the job of dropping the

(Testimony of Earle B. Vaux.)

anchor ordinarily is done by either the carpenter or by the Chief Officer?

A. There are a great many things that are done that are not ordinary in case of emergency, Mr. Young. Yes, that is true.

Q. The general practice is that?

A. The general practice.

Q. Why is it that you select those two officers to be the ones, or the carpenter and the Chief Officer, to be the ones who normally will drop the anchor?

A. The Chief Officer is on day work and the other officers stand watches, and it isn't good practice or a good idea to ask a man that has been standing a watch and been working cargo to go up and stand by; in other words, the Chief Officer is on in the daytime and he sleeps all night, and the other officers, they stand their watches and the carpenter also works on daytime.

Q. What were the duties of this lookout to whom you referred?

A. The regular duties of a lookout. [529]

Q. Well, what are they? The Court probably doesn't know.

The Court: Yes, I do; it just happens that I do.

Mr. Young: Q. Well, I would like to know more about them myself, for the record. Will you tell us, please, just what the duties of a lookout are? You say to maintain a lookout?

A. Yes.

(Testimony of Earle B. Vaux.)

Q. Anything else? A. Yes.

Q. What?

A. Carry out the orders of the bridge or a licensed officer.

Q. Do you know how long that particular lookout had been with your ship before the accident?

A. Well, no; changing men all the time, Mr. Young, I can't remember those things. I have a crew of forty men; I can't keep track of the time when they go and when they arrive. I could tell you by referring to my books and so forth, but actually carrying those figures in my head, no.

Q. The lookout was the only one on the fore-castle head at the time of the accident, wasn't he?

A. Yes, on the forecastle head. There is a stand-by man also on that watch.

Q. Where was he located at the time of the accident?

A. He is close by the bridge; in other words, so that the bridge officer blows a whistle, that is a pee whistle, a small whistle, and the lookout stand-by will answer that and find out what [530] the officer wants.

Q. So far as you knew, if you had ordered that lookout to drop the anchor do you know whether he knew how to drop it or not?

A. Will you please repeat that?

(The last question was read by the reporter.)

A. I would assume he did, but I couldn't swear

(Testimony of Earle B. Vaux.)

under oath that he would know how to carry out his orders.

Q. Well, no one gave any order to the lookout to drop the anchor, did he?

A. It wasn't necessary at any time.

Q. You have testified that if you were traveling, say, at about seven miles an hour, that dropping the anchor would not in any way retard the speed of the vessel.

A. You would probably lose your anchor.

Q. Probably lose it?

A. You would probably lose it, yes; when you fetch up on cold steel at that weight, you are not going to do much holding; she is on the snap.

Q. Well, now, when you drop the anchor, you can control the speed at which it drops, can't you?

A. No.

Q. You cannot?

A. You can if you are hooked up on a windlass and you back her out slowly; she will pay out very slowly, but that is a matter of minutes and minutes to get it down. [531]

Q. Are any of those anchors on your forecastle head hooked up to a windlass?

A. Two of them are, yes; they are hooked up when you hook them up.

Q. You have to hook them up first?

A. You have to hook them up first.

Q. In times of emergency you would hesitate

(Testimony of Earle B. Vaux.)

on taking a chance on losing an anchor rather than having a collision, wouldn't you.

A. No, you would just let go.

Q. You would let go? A. Yes.

Q. I ask you, if you did let go, wouldn't you expect that that anchor would to some degree retard the forward movement of the vessel?

A. Not at close quarters, no, sir.

Q. Well, in what distance, going at seven miles an hour, would you think it would be required before the anchor would commence to take effect?

A. I never dropped an anchor at seven knots. I wouldn't know. I wouldn't attempt to do it, unless an emergency arose, and then I would find out only by experience.

Q. Well, it is your understanding that the anchor was dropped—or rather that the order of full speed astern was given when you were traveling probably seven knots at the time of this accident? [532]

A. Approximately, I should judge, it was between six and seven. I couldn't judge.

Q. There were two different speeds and I wasn't sure which you intended to say. I am inquiring now as to the speed of the *Pennsylvanian* at the time the order was given full speed astern?

A. I couldn't judge with any accuracy on that speed.

Q. You couldn't?

A. No, sir. I know it wasn't full speed. I know she hadn't attained full speed.

(Testimony of Earle B. Vaux.)

Q. I understand. The purpose, however, of dropping an anchor under circumstances of that sort would be to let it drag on the bottom of the river; wouldn't that be true?

A. Sometimes they drag and sometimes they fetch up all of a sudden. It is according to your bottom, whether it is sticky, whether it is clay, whether it is hard, whether it is rocky, or whatever it is. Each place is a different condition.

Q. What do you have an anchor on a vessel at all for? A. To anchor her.

Q. And never when she is in motion?

A. Yes, sir. Oh, yes. Bending, warping around a dock, an anchor is used. She might have a little headway on at the time, the anchor is put down to swing her, to make her stern move one way or another, according to the particular anchor you use. Also, of course, for anchoring in thick weather, and so forth.

Q. Have you ever dropped an anchor when your ship was traveling [533] seven miles an hour?

A. I have not.

Q. Never have? A. No, sir.

Q. You know, as a matter of fact, it is frequently done in emergencies, don't you?

A. I have heard of it and I have heard also of the vessels coming up without any anchor on them afterwards; you just lose it.

Q. If it happened to prevent a collision, that would be all right, wouldn't it?

A. Yes, if it was necessary.

(Testimony of Earle B. Vaux.)

Q. Now, Captain, you have testified that from your experience on the river, it would be your opinion that it would be perfectly safe for river boats to use the west side of the river, and make a port to port passage; is that correct?

A. I am sorry; I didn't follow that. It is a long question.

(The last question was read by the reporter.)

A. Judging from steamships, yes sir.

Q. That is what I mean, judging from steamships; did you ever operate a river boat on the Willamette River?

A. No, sir, I never did.

Q. Have you ever operated river boats anywhere? A. Never.

Q. Well, then, do you know about the various problems that face men in the operation of their river boats from any personal [534] experience?

A. I have learned quite a few in this courtroom, Mr. Young, but I don't know, no, sir.

Q. Unfortunately this knowledge you didn't have prior to the accident, did you? A. No.

Q. Do I understand that your information on that subject is confined to what you have learned here in the courtroom?

A. The handling of river boats?

Q. The handling of river boats.

A. And tows?

Q. Yes. A. Mostly.

Q. Mostly. I see. So that when you gave your answer with regard to the matter of it being per-

(Testimony of Earle B. Vaux.)

fectly safe for the river boat to pass port to port, you were basing that upon your knowledge of the operation and piloting of ocean-going ships?

A. No.

Q. Not? A. No.

Q. What was it based on then?

A. It was based not on what I heard in this courtroom, but more what I have actually experienced in going down and passing port to port, by seeing others doing it and following out the law.

Q. Had you ever prior to this accident ever had occasion to [535] meet a river boat in the vicinity of Post Office Bar? A. Yes, sir.

Q. How frequently?

A. Well, I couldn't judge that. I have met them there at that particular bend.

Q. You have not at that particular bend?

A. I have met them at that particular bend.

Q. Oh, you have at that particular bend?

A. Yes, sir.

Q. Daytime or night?

A. Daytime mostly.

Q. Were these river boats traveling light or what did they have with them? A. Barges.

Q. Which side of the stream were they using?

A. On the port to port, they were on their own side.

Q. Is that the only time you have ever passed river boats at that particular place, port to port?

A. No.

(Testimony of Earle B. Vaux.)

Q. Have you passed them starboard to starboard at that particular place?

A. Yes. A log raft; I don't recall passing a barge there. I did pass a log raft there; I distinctly remember that.

Q. You have a distinct remembrance of that?

A. Yes, he had quite a long raft with him. [536]

Q. At that time you did not make a port to port passage, did you?

A. It was daytime; no, sir. He had a long raft with him and he was hugging the shore.

Q. Do you remember on that occasion which one whistled first, whether it was you or the tug boat?

A. I don't recall.

Q. You did not insist on your right to pass to the right of the other vessel at that time, then?

A. Conditions didn't permit it.

Q. What conditions didn't permit it?

A. The actual conditions that it was daylight, it was obviously and it could be seen that he was hugging and having quite a time on the left-hand side of the channel. A strong wind was blowing. A strong wind, natural conditions, that he was more or less in difficulty himself. He had all he could do to hug that side.

Q. Which way was the wind blowing that time?

A. I don't recall the way it was blowing, Mr. Young.

Q. By the way, what was the name of the lookout that was on the Pennsylvanian's forecastle head; was it Swearingen?

(Testimony of Earle B. Vaux.)

A. That is correct; it was Swearingen.

Q. Will he be here at this trial?

A. I don't know where he was; I believe the union took him off. They have a great deal of control.

Mr. Wood: I will say that he will not be here at this trial, [537] and I will add that he is not in the employ of the company. I wired to the company in San Francisco and requested that they find him and send him here, if they could, and they wired back that they didn't know where he was, that he had left their employ. There is no question, as I view it, at least, your Honor, of the lookout, but if my statement that he is unavailable needs corroboration by any testimony, I will ask leave to supply it. I don't think there is a lookout question in the case, myself.

Mr. Young: If the Court please, there is no charge made that there was no lookout on board the Pennsylvanian, but the question as to what that lookout saw is very important in this case, which is the reason that I have asked this question, to find out where that lookout is.

Mr. Wood: Furthermore, I will offer to allow counsel to use in this trial the testimony of that lookout given before the Steamboat Inspectors.

Mr. Young: Do I understand it is not going to be possible for you to produce that lookout?

Mr. Wood: It is not, no.

Mr. Young: I will accept the offer, your Honor,

(Testimony of Earle B. Vaux.)

to use the testimony of that particular lookout. I understand, however, that in so doing it is understood this lookout is a witness for the Pennsylvanian.

Mr. Wood: Oh, no, I didn't say that. I said if you wish to use his testimony, I am willing to let you. [538]

Mr. Young: Will you permit me to use a part of that testimony?

Mr. Wood: Well, no, of course not.

Mr. Young: And you can use any part you wish to clarify it.

Mr. Wood: It is very short; I think if you want to use it, you should use it all.

Mr. Young: I will check the testimony, your Honor, and we will take up this matter later.

Q. Captain, as I understand the reason why you got out the search light following the accident was to find out whether there was anyone aboard the barges that had been injured?

A. I wouldn't know they were barges; I hadn't seen them, in fact. I didn't know whether there were people living aboard there or being aboard there at the time, or not. And I was anxious to find out, to pick men up, if anybody had been injured. That was the idea of the use of the search light.

Q. Who gave the order for the search light to be used? A. I did.

Q. So you were interested in finding out

(Testimony of Earle B. Vaux.)

whether there was anyone there that had been injured and that is why you got out the search light?

A. That is true.

Mr. Young: I think that is all.

Redirect Examination

By Mr. Wood: [539]

Q. Captain, after the collision was all over, did you hear the testimony of the Captain of the tug Cruiser that when you went down the river with the Pennsylvanian, you passed between one of the barges and the west bank, in other words, you passed——

A. Yes, sir.

Q. ——the barge on your own starboard side?

A. Yes, sir.

Q. Is that correct or not?

A. Both barges were on our starboard hand when we went downriver, yes; the tug Cruiser had arrived on the scene fifteen minutes afterwards and after I had used a megaphone to find out if there was anybody aboard the barges or if he needed any assistance, he had replied in the negative.

Q. At that time the barges were on the east side of the river, were they?

A. Yes, sir.

The Court: Mr. Wood, where did the Pennsylvanian drydock for repairs required by this collision?

Mr. Wood: Q. Where did she, Captain?

A. Portland Drydock.

The Court: Q. Portland?

(Testimony of Earle B. Vaux.)

A. Had to wait there.

Q. She came back here?

Mr. Wood: Q. Did she come back here then?

A. She went—we started down-river after the collision; I [540] didn't believe the Pennsylvanian was damaged at the time. I took soundings and she was making no water whatsoever, but upon making headway through the water, which we later proved and found out, she started to fill and the vessel was turned around and returned to Portland.

The Court: Q. How far down the river did she turn around?

A. I don't know just the—under way for between half and three-quarters of an hour, she started to fill.

Q. Then you turned around?

A. Yes, sir, when the soundings showed that she was filling.

Q. What time did you get back to Portland?

A. I would have to refer to the log book for that.

Q. About what time?

A. About two o'clock.

Mr. Wood: That is all.

Mr. Young: That is all.

(Witness excused.) [541]

OSCAR NELSON,

produced as a witness in behalf of the Respondents,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Wood:

Q. Mr. Nelson, where do you reside?

A. Jacksonville, Florida.

Q. And you are employed by the American-Hawaiian Steamship Company, aren't you?

A. Yes, sir.

Q. And you are Third Mate on the steamship Pennsylvanian, are you?

A. I am Fourth Mate right now, or Junior Third.

Q. Fourth Mate or Junior Third. What were you on her at the time of her collision with the Barry "K"?

A. Third Mate.

Q. Third Mate. And where were you on the ship at the time of that collision?

A. On the bridge.

Q. And what duties were you performing on the bridge?

A. Assisting the pilot in keeping the lookout and tending to the telegraph and watching the helmsman and any other duties that were required by the Master or the pilot. I assisted both of them.

Q. You said watching the helmsman. Watching him for what purpose?

A. To see that the pilot's orders were carried out.

Q. That is one of the regular duties of a Third

(Testimony of Oscar Nelson.)

Mate, assisting [542] in the navigation of the ship, is it not? A. Yes, sir.

Q. When you gave the orders on the telegraph, did you make any notation of them?

A. I noted the orders in the bell book, the time and the bells.

Q. Did you note them in the bell book itself or on the scraps of paper and later copy them in the bell book? A. In the bell book.

Q. At the very time? I thought you told me you noted them on scraps of paper first and then put them in the bell book a little while later.

A. No, that was after the collision; I took some of the bells on paper.

Q. In making those entries in the bell book, as long as you are on that subject, describe how exactly you note the time, whether you note it to seconds or minutes or what?

A. To the nearest minute.

Q. That is, suppose you made an entry at 12, let's say, 52, something having happened then, that could be as late as 12:52 and 25 seconds; is that what you mean?

A. 12:52 and 25 or anything up to 30 seconds would be 52.

The Court: Speaking of minutes, Mr. Wood, two vessels sighting each other about a mile apart, as these did, going at the speed that they were going and doing the things they did meanwhile, about how much time elapsed? [543]

Mr. Wood: I will have to do a little calculation

(Testimony of Oscar Nelson.)

on that, your Honor. I wouldn't answer it off-hand. Well, if they were going each six miles an hour, let us say, it would be closing the gap between them at the rate of twelve miles an hour. Can you answer that for me?

Mr. Vaux: If a vessel will make a mile every five minutes, making twelve knots an hour, the two vessels approaching would just cut that distance in two, to two and a half minutes. The mile would be closed in that time.

Mr. Wood: If they were going twelve knots an hour, but in this case, let's assume they were going six knots for an easy calculation.

Mr. Vaux: Sir?

Mr. Wood: The Barry "K" says she was going six knots and you said you had attained a speed of seven and then cut it down. For a rough calculation, if they were each going six knots and kept on going six knots, they would close a mile gap in five minutes.

The Court: These events transpired, roughly, we may say, in a period of five minutes.

Mr. Wood: You mean from the time they first saw each other?

The Court: Yes.

Mr. Wood: I would think so possibly. That is largely guesswork on my own part.

The Court: It is rather important, though. [544]

Mr. Young: If the Court please, might I call attention to the fact that the testimony of the pilot

(Testimony of Oscar Nelson.)

Norberg was that the Pennsylvanian had reduced its speed to about one to two knots an hour when the collision occurred, which would make some difference in the computation?

The Court: While I am bothering you, does the last clear chance rule apply in admiralty?

Mr. Young: Yes, your Honor.

The Court: What is your view about it?

Mr. Wood: I think it does, if it is plainly there. I think it has to be very plainly there. The ordinary rule, I think, is that where one vessel by her primary fault has put the vessels in a situation where the collision may occur, why that primary fault is the one that has the great importance attached to it.

The Court: This doesn't happen to be the Pennsylvanian that was the genesis of that rule, this particular Pennsylvanian?

Mr. Wood: You mean the Pennsylvania rule?

The Court: Wasn't that the rule you just stated?

Mr. Wood: No, the Pennsylvania rule is that where one vessel has committed a statutory violation, the burden is on her to prove not merely that that did not probably cause the collision but that it couldn't have caused it. That is not this ship. That rule, I think, began in 1870, something like that.

Mr. Young: I assume counsel means where there is actually a statutory violation to start with. [545]

(Testimony of Oscar Nelson.)

The Court: Well, we will determine that later on.

Mr. Wood: Now, this discussion has diverted my attention a little bit from where we left off.

Q. Mr. Nelson, did you see the Barry "K" ahead of you down the river?

A. I saw the——

Q. The lights?

A. I saw the lights from the Barry "K".

Q. And about how far away was she when you saw her, do you think?

A. When I first saw her?

Q. Yes.

A. When I first saw her, she was about a mile away.

Q. And what lights did you see?

A. The first lights I saw were brilliant lights around the deck, which were not the navigation lights. They were the first lights that drew my attention, but almost immediately after I saw the white—two white towing lights and the red side light.

Q. Could you tell at that distance which side of the river she was on?

A. No, sir.

Q. What whistle signals were exchanged?

A. The Barry "K" blew one short blast of the whistle, a passing signal, one short blast of about a second's duration.

Q. Where were you when you heard that?

A. I was in the wheelhouse. [546]

(Testimony of Oscar Nelson.)

Q. And what did the Pennsylvanian do in answer?

A. The Pennsylvanian answered the signal with one short blast of the whistle.

Q. Was that short blast from the Barry "K" a clear one and distinct so you could tell definitely what it was or was it a whistle that left you in doubt? A. Distinctly one blast.

Q. Yes. Was there any doubt in your mind when you heard it that it was one blast?

A. No, sir.

Q. Did you hear Captain Norberg say, "That was one blast" or "Was that one blast"?

A. Yes, sir, he said something about one blast and we all—Captain Vaux and I both confirmed it.

Q. Is this a practice to do that?

A. Yes, sir, it is.

Q. Well, then, what side light of the Barry "K" was showing to you at the time of that one blast?

A. The red side light.

Q. Later on, did she show her green light?

A. Yes, sir, she did.

Q. Could you give any estimation of how far apart the vessels were when she showed her green light?

A. Oh, I would say—I don't know exactly; about half a mile, it looked like to me. [547] It might have been closer.

Q. And what was done with your engines on your ship when the Barry "K's" green light appeared?

(Testimony of Oscar Nelson.)

A. The engine was put half ahead and then stopped, almost immediately afterwards.

The Court: What does the bell book show as to the time of that?

Mr. Wood: The bell book shows both those signals at 12:54, your Honor.

The Court: And the collision was 12:55?

Mr. Wood: To the nearest minute.

The Court: Had he made those entries?

Mr. Wood: I am just about to ask him.

Q. The Court wants to know whether you are the man that kept that bell book and made those entries?

A. Yes, sir, I made all of these entries.

The Court: Q. Did you make that right at the time?

A. Yes, sir, right at the time.

Q. Before the collision, you wrote down that notation?

A. Before the collision, yes, sir. When I got the——

Q. You are a man of great concentration.

Mr. Wood: That is the regular duty.

A. If I don't write them down right away, your Honor, why they run up on me; I wouldn't be able to catch up.

The Court: Q. Evidently you didn't anticipate a collision [548] right at that time?

A. No, sir.

Q. Although you collided less than two minutes later?

(Testimony of Oscar Nelson.)

A. Less than two minutes, yes, sir.

Mr. Young: May I see the book, please?

Mr. Wood: I want to defer until I get the book back.

The Court: Yes, sir.

Mr. Young: I didn't want to interrupt your examination.

Mr. Wood: Q. Now, your bell book entry there shows that at 12:50, I think. Is this right, 12:50 the engines were put full speed ahead?

A. 12:50 was full speed ahead, yes.

Q. Then at 12:54 your entry shows half ahead, stop? A. Half ahead and stop.

Q. And those bells followed immediately one on the other, you say?

A. Yes, sir, they were some seconds apart, a few seconds.

Q. What?

A. They were a few seconds apart.

The Court: Then the next entry, I assume, was the collision at 12:55, or full astern?

Mr. Wood: I was just going to come to that.

Q. Well, in this interval between the half ahead and stop, you say a few seconds apart. Do you mean just enough seconds there to indicate two separate signals or what do you mean? [549]

A. Well, it indicates two separate signals. There is half speed on the telegraph and the engine room repeated the half ahead and almost immediately after that was the stop.

(Testimony of Oscar Nelson.)

Q. I see. A. And they repeated the stop.

Q. All right. Now, that was to the nearest minute at 12:54, according to your record?

A. The nearest minute, yes.

Q. Now, at that time had you received any danger signal yet from the Barry "K"?

A. No, sir.

Q. Now, about how long after that did you give the full speed astern? A. About a minute.

Q. Yes. And what was the reason for you giving that full speed astern?

A. The Barry "K" had blown a danger signal.

Q. The first one?

A. The first one, yes, sir.

Q. On receipt of that first danger signal from the Barry "K", your engines were put full speed astern; is that what you mean?

A. The Pennsylvanian's engine was put full speed astern and the pilot blew three short blasts of the whistle to indicate the fact.

Q. I say, was that done immediately you heard the danger signal from the Barry "K"? [550]

A. Immediately.

Q. And because of that danger signal?

A. Because of that, yes, sir.

Q. Now, what entry do you have in your bell book showing what time that was done; what does your bell book say as to the time? A. 12:55.

Q. 12:55. And you have another entry there for the same minute have you not, the word "hit"?

(Testimony of Oscar Nelson.)

A. Yes, sir.

Q. Now, were those two things together or was there an interval of time between the reversing and the collision?

A. There was an interval there of about—approximately a half to three quarters of a minute.

Q. Between your full speed astern and the collision?

A. Yes, sir.

Q. Did you notice—I don't know whether you were busy with other duties or not—did you notice whether your ship's head swung to the right on the reversing of the engines when she went full speed—

A. Yes, sir, the ship swung to the right; her head swung to the right.

The Court: Q. You never heard a starboard to starboard signal at any time?

A. No, sir, I didn't.

By Mr. Wood:

Q. Well, did you see any lanterns or lights on the barges of the [551] Barry "K" before the collision?

A. No, sir, I did not.

Q. Did you see any there after the collision?

A. I saw a lantern.

Q. Describe it.

A. A lantern of—one of these tall types, like they use on construction work or farmers use them, or watchmen.

Q. How did you happen to see them?

(Testimony of Oscar Nelson.)

A. Captain Vaux drew my attention to it.

Q. Is that when he put——

A. He had the search light on the barge.

The Court: Why did he draw your attention to it?

A. He called my attention to the light, your Honor; he says, "Take a look at that light," he says, "this is going to be important."

Q. What did you understand he meant by that?

A. I understand he meant that I take good notice of where that light was.

Mr. Wood: Q. Where was it?

A. It was standing on the deck on one of the corners of the barge.

The Court: Q. You mean in the wrong place or what? What do you mean? Explain that a little further.

A. It was on top of the——

Q. What did you understand the Captain wanted you to take note of it for, because it was in the wrong place or because it was an [552] improper light?

A. Because it was an improper light, yes, sir.

Q. And was the only light?

A. And was the only light, yes, sir.

Mr. Wood: Could you tell whether it was burning or not?

A. I didn't notice; it didn't look as though it was burning, to me. Of course, the search light was on it at the time and it is hard to tell whether it was burning or not.

(Testimony of Oscar Nelson.)

Q. Yes. The Court asked you whether you at any time heard any starboard to starboard signals from the Barry "K". Do you remember his asking you that? A. Yes.

Q. And you said "no." I will ask you whether you were listening for signals or whether you were attentive?

A. At the time I was concentrating more on listening for the pilot's orders, to see that his orders were carried out properly.

The Court: Q. Why were you concentrating on that so closely?

A. Why, I had to ring the telegraph and watch that I got the return——

Q. Yes, but why were you concentrating so closely at that particular time? That is your job all the time, to watch the telegraph and see that you get the return, isn't it?

A. Yes, sir, that is right.

Q. Why at that particular time were you so occupied with that more than usual? [553]

A. I just happened to be a little more than usual, your Honor.

Q. Why?

A. Just can't say why; it just happened that way, I believe.

Mr. Wood: That is all.

The Court: We will take the morning recess. I suggest fifteen minutes.

(Whereupon at 10:45 o'clock A.M. a short recess was taken.)

(Testimony of Oscar Nelson.)

The Court: Q. Have you ever been in a collision before, Mr. Nelson?

A. Yes, sir, I have.

Q. Have you testified in collision cases before?

A. I testified in front of the Steamboat Inspectors at Los Angeles.

Q. How old are you? A. Forty-three.

Q. Where were you born?

A. Michigan, sir.

Cross Examination

By Mr. Young:

Q. You testified, Mr. Nelson, that with the search light playing upon this light that was on the barge, it was difficult for you to tell whether the light was lighted or not; is that correct?

A. Yes, sir. [554]

Q. Is that due to the brilliancy of the search light blotting out any light that might have been in this lantern? A. Yes, sir.

Q. I noticed, Mr. Nelson, that you called that a construction lantern. Where did you get the word "construction" lantern?

A. Why, that is what I have always heard that type of lantern called.

The Court: Q. Mr. Nelson, they used to be good in barns in Michigan, too.

A. We use them up there.

Mr. Young: Q. You used them up there, did you? A. Yes, sir.

Q. I noticed that you and Captain Vaux and

(Testimony of Oscar Nelson.)

Captain Norberg all called this a construction lantern. Did you by any chance discuss that matter among yourselves after the accident?

A. Not in regards to the lantern.

Q. You had no discussion with either of those two——

A. I remember when Captain Vaux referred to the lantern first, he says “a regular construction lantern.”

Q. When Captain Vaux called that matter to your attention, what did you understand he was doing, preparing you as a witness for a possible lawsuit? A. Possibly, yes.

Q. I see. Now, referring to this bell book from which you were testifying, I am now pointing to the part of the bell book [555] where appears the 12:50 A.M.; is that your handwriting? A. Yes.

Q. And this says “January 31.” That should be February 1, shouldn’t it?

A. It says February 1 here.

Q. I beg your pardon. That is in the body here, isn’t it? Now, at this place where it says 12:50 right after that, there is some kind of a hieroglyphic that I don’t understand. What is that?

A. Oh, that is the full ahead signal to the engine room.

Q. Is that a mark that you have to indicate full ahead? A. Yes.

Q. It doesn’t say “full ahead” in so many words, does it? A. No, sir.

(Testimony of Oscar Nelson.)

Q. Then right alongside of that appears 12:54 and another sort of mark. What does that mark mean? A. That is half ahead.

Q. And what does the "X" mean?

A. Stop.

Q. Now, 12:55, and there is a mark after that. What does the mark there mean?

A. Full astern.

Q. And then the word "hit" appears. That means the collision occurred? A. Yes.

Q. 12:59 there is an "X". [556] A. Stop.

Q. What do you mean by "stop" at that time?

A. That meant that the full astern—the bell was changed from full astern to stop.

Q. But up here after the 12:54 you have an "X" also, which means stop, doesn't it?

A. That means stop.

Q. Well, did you have two stop orders there, one at 12:54 and one at 12:59?

A. Yes, sir, that is right.

Q. Do I understand from this that the Pennsylvanian was in motion then from the time the collision occurred until 12:59? A. In motion?

Q. She was in motion or was she?

Mr. Wood: He is asking you.

Mr. Young: Q. Was she in motion between 12:55 and 12:59?

A. Yes, she was in motion.

Q. Which direction was she going?

A. That I can't say.

(Testimony of Oscar Nelson.)

Q. You didn't make any notation here in your bell book as to what direction she was traveling?

A. No, I couldn't say that.

Q. You next have a notation of 1:02 with a caret mark after it. What does that caret mark mean?

A. Slow ahead. [557]

Q. Slow ahead. Then 1:03 means stop again?

A. Stop.

Q. What was the occasion for that slow ahead and stop; do you know?

A. I believe the pilot was—he was maneuvering the vessel, trying to straighten her out.

Q. Now, Mr. Nelson, am I correct in my understanding that according to your notations here, the *Pennsylvanian* was in motion some direction all the time from 12:55 to 12:59 A.M.; is that correct?

A. She was in motion, but I can't say what direction.

Q. Is there anything on your record there to indicate which direction she may have been going either before or after this notation of 12:55 and 12:59? A. No, sir.

Q. Now, will you tell us again just what whistles you actually heard from the *Barry "K"*; what was the first whistle you heard?

A. The first whistle I heard was one short blast, a short while after we straightened out after coming off the Post Office Bar range, approximately a minute.

Q. Then did the *Pennsylvanian* answer that whistle?

(Testimony of Oscar Nelson.)

The Court: Q. What did you say just then, approximately what?

A. Approximately a minute after we left the range, yes, sir.

Mr. Young: Q. Is there anything in your bell book to indicate that or is that from memory? [558]

A. I knew it was a little after the time we went full ahead.

Q. There is no notation in your bell book on that point, is there? A. No, sir.

Q. In fact, you don't keep a record of whistles in your bell book, do you? A. No, sir.

Q. Then was this whistle from the Barry "K" answered by the Pennsylvanian?

A. Yes, the whistle was answered.

Q. By what kind of a blast or blasts?

A. One short blast.

Q. And what is the next whistle that you heard?

A. The next whistle I heard was the danger signal from the Barry "K".

Q. Yes. And how many blasts was that?

A. I couldn't say definitely how many blasts it was. It was several. It was four or more.

Q. And was that answered by the Pennsylvanian? A. No, sir.

Q. The danger whistle? A. No, sir.

Q. It was not?

A. It was not answered, no, sir.

Q. Well, have you now, then, told us all of the whistles that you heard from either boat? [559]

(Testimony of Oscar Nelson.)

A. No, I have not.

Q. All right now. What whistle is there that you have not yet mentioned?

A. The three whistles from the Pennsylvanian indicating going astern.

Q. Was that after you heard this danger whistle from the Barry "K"? A. Yes.

Q. Well, then, do I understand that this was the order in which you heard the whistles: First you heard one blast from the Barry "K", answered by one blast from the Pennsylvanian?

A. That is correct.

Q. Next you heard a danger whistle of four or more blasts from the Pennsylvanian——

A. No.

Q. I mean from the Barry "K". Pardon me. And after that you heard three whistles from the Pennsylvanian? A. Yes.

Q. Are those all of the whistles that you heard?

A. That is all I heard.

Q. You wouldn't say, however, but that there were other whistles that you did not hear?

A. It is possible that there were other whistles, but I didn't hear them.

Q. There may have been other whistles either from the Barry "K" or from the Pennsylvanian that you did not hear? [560]

A. There were no more from the Pennsylvanian.

Q. You have told us all of the whistles that were blown by the Pennsylvanian? A. Yes, sir.

(Testimony of Oscar Nelson.)

Q. But there may have been some then from the Barry "K" that you didn't hear? A. Yes.

The Court: Q. Going back to your speed on the range, ordinarily you wouldn't go full speed until you had left the range, would you? A. Yes.

Q. Would you go full speed——

A. We don't have any definite place to go full speed.

Q. I understand, but the water being what it is and the channel being what it is, ordinarily you would run clear down that range and turn off it before you went full speed, or do you know about that?

A. It is the usual custom in my experience to run down about that far at slow speeds and half speeds and the reason for that, I think, is on account of a lot of brilliant lights along the bank on both banks there up to that point. And also draw bridges and small boats coming up from the——

Q. So when we find in the bell book there the time when you went full speed ahead, in your view that is when you got off the range?

A. Yes, sir. [561]

Q. That is when you left the range.

Mr. Young: The last bridge that you had occasion to go through was up at St. Johns, wasn't it?

A. St. Johns, yes, sir.

Q. And how far would that be from the place where this accident occurred?

A. I don't know definitely.

(Testimony of Oscar Nelson.)

Q. It is a considerable distance up the river from the point of accident, isn't it?

A. It is not very far.

Q. A couple of miles, would you think?

A. It may be that much. I couldn't say for sure.

Q. Now, where are these brilliant lights that you said would trouble you if you went faster than half speed along Post Office range?

A. Why, there is a lot of them all along the bank there as far as Linnton.

Q. As far as Linnton? A. Yes.

Q. Well, Linnton is up opposite St. Johns, isn't it? A. Yes.

Mr. Wood: Pardon me, Mr. Young; he never said white lights were bothering him along the range.

Mr. Young: I want to get this clear. Do you mean to say that there were any lights along either bank of the river in the [562] vicinity of Post Office range that made it necessary for the Pennsylvanian to go half speed along the range?

A. No, sir, there isn't.

Q. That is what I was getting at. As a matter of fact, don't you customarily start going full speed ahead as soon as you get about to the city limits of Portland?

A. Well, sometimes we do and sometimes we don't.

Q. The city limits are some distance upstream from Post Office range, aren't they?

(Testimony of Oscar Nelson.)

A. The city limits are approximately at Terminal 4.

Q. Yes. Then as I understand, sometimes at that point you go full speed ahead and sometimes you don't; is that right?

A. I couldn't say definitely whether that is the case or not. To the best of my memory it is.

Q. How frequently have you had occasion to travel through the Willamette River?

A. About once every two months or so, two and a half months or twice every two and a half months.

Q. Through what period before this accident?

A. For a period of about ten years.

Mr. Young: That is all.

Redirect Examination

By Mr. Wood:

Q. Mr. Nelson, this bell book of yours is what its name implies, it is a record of the bells given, is it not? [563]

A. Yes, sir.

Q. That is all it is, isn't it?

A. That is all it is, yes, sir.

Q. It is a record of the orders that are given on the bridge by means of the telegraph to the engine room?

A. Yes, sir.

Q. It is nothing more than that, is it?

A. Well, sometimes we keep a note of certain places we pass.

Q. Like this "hit," I don't mean that, but this is not a record of the ship's movements, is it?

A. No, sir.

(Testimony of Oscar Nelson.)

Q. So what did you mean when you said in reference to this bell book that there was one stop order at 12:50 and then some intervening bells and another stop order at 12:59; why did you say that the ship was in motion all that time from 12:50 to 12:59 if the book is no record of the ship's motion?

A. Well, the ship must have been in motion one way or the other, whether it was ahead or astern or sideways; the engine was going full astern and tending to throw her head to the right, so she must have been in motion that way. And as far as her headway, I can't say how much motion, and if there was sternway, I couldn't say whether they had sternway.

Q. You couldn't say whether she was swinging, how much to the right or what?

A. No, sir, she was in motion anyhow. [564]

Q. That is what you meant? A. Yes.

The Court: Q. That stop was 12:54, wasn't it?

Mr. Wood: No, your Honor—yes, excuse me; did I say 12:50?

The Court: Yes.

Mr. Wood: Excuse me. I was wrong. It is "stop" at 12:54. A. 12:54 is the stop.

Mr. Wood: Yes, I would like the record corrected to show that.

Q. You said that the only whistles that you remember hearing from the Barry "K" were the one blast and the danger signals. After the Pennsylvanian blew her three blasts to indicate her en-

(Testimony of Oscar Nelson.)

gines going astern, there has been some testimony that the Barry "K" then followed that with three blasts. I want to know whether you heard those or not.

A. I didn't hear those, no, sir.

Q. Were the running lights and navigation lights of the Pennsylvanian all in order?

A. Yes, sir, they were in order.

Q. And burning? A. And burning.

Mr. Wood: That is all.

Mr. Young: That is all.

(Witness excused.) [565]

EARLE B. VAUX

was recalled to the stand and testified further as follows:

Cross Examination
(Continued)

By Mr. Young:

Q. Captain Vaux, you testified that it was the custom for the pilot on the steamer to confer with other persons on the bridge with regard to the identity of whistles that might be heard from other ships; is that correct?

A. Well, you would confer—it is kind of misleading, Mr. Young.

The Court: "Confirm" is the word they always use.

(Testimony of Earle B. Vaux.)

A. (Continuing): "Confirm" is the word.

Mr. Young: Q. Was the practice for the pilot to have his own ideas, let us say, confirmed then by other persons on the bridge with regard to the identity of whistles; is that right?

A. Will you please state that question again?

Q. You said that when Captain Norberg heard a whistle he turned to you and asked if that was one blast—did he?

A. They don't ask if it is one blast. They make a remark of "One blast."

Q. Is that what he did on that occasion?

A. Yes, sir.

Q. Now, did I understand you to say that that is a custom or practice for pilots always to do that?

A. In my experience, yes, sir.

Q. And your experience is confined to the American-Hawaiian? [566] A. True.

Q. Isn't it a fact that that custom relates to a situation where the pilot is in doubt as to what he hears? A. Absolutely not.

Q. Does he make that comment; does he call out what the signal is irrespective of whether he is certain that he knows what the signal is?

A. He calls out when he hears what he believes and that in his mind is a signal, he makes that remark, yes, sir, whether that vessel is close aboard or a long ways away. It doesn't make any difference if the vessel is astern desiring to pass, he will make that remark, yes, sir.

(Testimony of Earle B. Vaux.)

Q. Does this custom to which you refer include mentioning anything unusual that might be happening apart from signals?

A. Nothing unusual happened.

Q. For example, Captain Norberg said that he saw a sheer of the Barry "K". Was it part of the custom for him to mention that to other men on the bridge?

A. I don't recall that testimony that he saw her sheer.

Q. I think he did so testify, but did he say that to you at the time—before the collision?

A. I don't recall that conversation myself, Mr. Young.

Q. Well, let us assume that the pilot did see a vessel approaching from ahead and that vessel took a sheer, would it be part of this custom that you are referring to that the pilot should [567] mention that to other men on the bridge?

A. He would probably act first and then discuss it afterwards.

Q. He would act first and discuss it afterwards?

A. In case of an emergency.

Q. But if it were a whistle he would talk first and act later; is that right?

A. Well, you speak of talking first and acting later; there seems to be quite an interval of time. Those things happen almost instantly. You will remark that it is one blast and whatever you heard, why you will mention or repeat that it was one blast

(Testimony of Earle B. Vaux.)

or it wasn't one blast, or if there was any doubt, you would say so.

Q. Now, in the event, when Captain Norberg said to you "One blast," that you had been of the impression that that was two blasts and you said, "No, two blasts," then what would happen after that?

A. Then there is only one thing that could happen.

Q. What?

A. The danger signal would be given to know that you didn't understand what the other vessel is going to do.

Mr. Young: That is all.

The Court: Q. Now, that is what the danger signal means in a situation like this?

A. Yes, sir.

Q. It is intended to tell the other man—— [568]

A. That you are running into danger.

Q. And that you don't understand him?

A. Yes, sir.

Redirect Examination

By Mr. Wood:

Q. Captain Vaux, counsel's questions to you about a sheer, whether Norberg would confirm to you if the other vessel was taking a sheer, implied that that sheering was something quite unusual. Now, in your testimony before it was that a temporary sheer from an approaching ship——

Mr. Young: If the Court please, I object to

(Testimony of Earle B. Vaux.)

counsel commenting upon the evidence in this manner. He may ask the witness questions, but he is now making a speech.

Mr. Wood: I thank you for the compliment. I didn't know I was such an orator.

Mr. Young: I didn't say you were an orator; I said you were making a speech.

Mr. Wood: Q. Captain Vaux, is a temporary sheer by an approaching vessel, especially the distance apart that you have spoken of, an unusual thing? A. No, sir, it is not unusual.

Mr. Wood: That is all.

Recross Examination

By Mr. Young:

Q. One more question, Captain. Suppose that pilot Norberg [569] or you had understood the first signal from the Barry "K" to be two blasts instead of one, what would you have done then?

A. Answered with two.

Q. You would have answered with two?

A. If you understood it to be two blasts, yes, sir.

Q. And then if you had answered with two, you would have made a starboard to starboard passage, wouldn't you?

A. If there wasn't any danger, yes, sir.

Q. Well, on that particular occasion, suppose you had understood the signal from the Barry "K" to be two blasts instead of one.

A. That never came up, Mr. Young.

(Testimony of Earle B. Vaux.)

Q. Well, I am just asking you now, what would have been your—you would have answered with two blasts; is that correct?

A. The pilot was in charge.

Q. What? A. The pilot was in charge.

Q. Would it have been the duty of the pilot to answer with two blasts?

A. I don't know what the pilot would have done at that time.

Q. Why is it you are changing your answer now, Captain? A. I am not, sir.

Q. You testified a few moments ago that if there had been two blasts from the Barry "K", the answer from the Pennsylvanian would also have been two blasts?

A. By law it would have been two blasts. [570]

Q. That would have meant a starboard to starboard passage, wouldn't it? A. Yes, sir.

Mr. Young: That is all.

The Court: Q. Well, Captain, you could have rejected his signal, couldn't you?

A. You could have given the danger signal, if danger had existed, yes, sir.

Q. If, in your opinion, a starboard to starboard passing was not safe or practicable, you could have rejected his signal and given him the danger signal, couldn't you? A. Yes, sir.

Q. And then both presumably would have checked your speed and—

(Testimony of Earle B. Vaux.)

A. Gave the proper passing signals, yes, sir.

Q. Settled it in some other way. I don't know what you do after you get stopped. That never occurs in any of these cases; nobody ever gets stopped.

Mr. Young: That is all as far as I am concerned.

(Witness excused.) [571-572]

Mr. Wood: Call Captain Lumm.

WILLIAM LUMM,

produced as a witness in behalf of the Respondents, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wood:

Q. Captain Lumm, are you a resident of Portland? A. Yes, sir.

Q. And have resided here a great many years, have you not?

A. About forty-five years.

Q. And what has been your occupation here?

A. Working on the river, steamboats.

Q. In what capacity?

A. All capacities except on the deck, in the deck compartment.

Q. What has been your experience as a towboat man here on the river handling tugs and tows?

A. Well, I towed barges here for about—exclusively for about, oh, approximately eighteen years, sixteen or eighteen years.

(Testimony of William Lumm.)

Q. What kind of barges were they?

A. All kinds.

Q. And what kinds of towboats did you handle?

A. Mostly stern-wheelers.

Q. Like this Barry K?

A. Well, something similar, yes; some smaller.

Q. And during that eighteen years that you were towing barges, [573] who was your employer or employers?

A. I worked for the Diamond O Navigation Company about eight years.

Q. That is Mr. Drake O'Reilly's company?

A. Yes.

Q. And what other company?

A. Well, I worked, myself; I owned my own boat.

Q. You had your own boat? A. Yes.

Q. And what experience have you had, if any, as a river pilot of ocean steamers?

A. Well, I have piloted ocean steamers for about five years—four years.

Q. Are you a member of this Columbia River Pilots Association? A. No, I am not.

The Court: Couldn't you get in the lodge?

A. Apparently not.

Mr. Wood: Q. You might explain that answer. What do you mean? The Court asks you whether you could not get in the lodge and you said apparently not. Have you anything further to say on that?

(Testimony of William Lumm.)

A. I suppose he refers to the Columbia River Pilots Association.

Q. Yes, he does.

A. Well, I made application to join them and they never saw fit to take me in. Perhaps they never needed me or something. I don't know.

Q. What? [574]

A. They never took me in, anyway.

The Court: They are pretty choosy, are they not?

A. Well, I think so. They have a right to be.

Mr. Wood: Q. Their ocean steamers, of course, are of many different sizes. I want to know whether you have acted as pilot on steamers of a comparable size as the Pennsylvanian and ships of that general type.

A. Yes, I think I have piloted ships as large as the Pennsylvanian.

Q. And have you handled tugs and tows of similar character to the one that the Barry K had the night with the barges?

A. I think she had two—did she have two barges? I am not familiar with what she did have, exactly.

Q. Yes. I will show you what she did have with the photographs. You may look at all of the photographs, if you want to. They are all in evidence.

A. I don't recall distinctly that I ever had two covered barges in tow at one time. I might have.

Q. Have you ever towed sawdust barges?

(Testimony of William Lumm.)

A. Yes. Yes, I have towed sawdust barges, two sawdust barges.

Q. They are higher up in the air?

A. Well, I have towed two of those at one time many times.

Q. Are you familiar with the channel in the Willamette River at Post Office Bar?

A. Quite familiar.

Q. How many years have you been navigating up and down through there? [575]

A. About thirty years pretty steady.

Q. Pretty steady. You mean comparatively frequently? A. Yes.

Q. Do you know what the width of that channel used to be before it was widened to its present width?

A. Well, at one time when I first went down there it seems to me it was pretty narrow. I don't know exactly, but I don't think it was very wide. I know we were towing sailing ships and we had to keep pretty close to the jetty, there, but I was only mate then and I didn't know exactly what width the channel was.

Q. How wide, approximately, is it now, the dredged channel?

A. I think it is around eight hundred feet.

Q. How do ocean steamers meeting in that channel pass? A. They pass port to port.

Q. How do towboats with tows meeting there pass ordinarily?

(Testimony of William Lumm.)

A. Well, the log boats with tows always keep over to the east side of the river, but barges, the majority of them, I think, probably use the east side.

Q. Going which way?

A. Coming upstream.

Q. I mean, if a towboat and a barge are going down and a towboat and a barge are coming up, how do they customarily pass?

A. Well, they frequently make a port to port passage.

Q. Yes. Now, when an ocean steamer going down meets a towboat and a barge coming up, how do they pass? I mean, is there a regular [576] way to pass, or do they pass both ways, or what is it?

A. I think they pass both ways, is my experience.

Q. What do you say? What is your opinion as to whether or not it is safe and practicable for an ocean steamer going down and a towboat with two barges and tow coming up to make a port to port passage, there?

A. Why, it is perfectly safe.

Q. Is it practicable? A. Yes.

Q. Assuming that a river boat, there, the Barry K, with ordinary power, as such boats have, is coming up there with two loaded barges at night time and there is a ten- to fifteen-mile breeze from the East and, say, a half mile to a mile current going

(Testimony of William Lumm.)

down the river, would those conditions be adverse for the up-coming tug and tow to keep to her right-hand side?

A. A ten- or fifteen-mile wind wouldn't amount to anything with loaded barges and a boat of that power.

Q. And how about a half a mile or a mile of current? Would that amount to anything against her?

A. Oh, it slows her down slightly.

Q. I mean, would it render it impracticable for her to keep to the right-hand side? A. No.

Q. Would she steer and handle better going up against such a current or coming down with such a current? [577]

A. Well, she steers slightly better going against the current, a little quicker.

Q. Now, if she were coming up under the conditions I have described, would there be what some of the witnesses have called a slip on her part in toward the right-hand bank?

A. There shouldn't be any perceptible slip, no.

Q. If there was any slip at all under those conditions, how much would the towboat have to head out into the current and the wind to counteract the slip?

A. Well, she surely oughtn't to head out much more than three degrees under those conditions.

Q. One witness testified here that it would be necessary for the tug and barges to head out at an angle of 45 degrees. What would be the result if she did head out 45 degrees? What would she do?

(Testimony of William Lumm.)

A. Well, if he held her out 45 degrees you would certainly run across the river pretty quick, if he was going ahead.

Q. If she were coming up there on the right-hand side and heading out at some slight angle, three degrees or even five degrees, to keep off the right-hand bank, how close could her stern be to the old piling there and still be perfectly safe?

A. Well, as long as it didn't hit the piling it wouldn't hurt anything. She could be up there close if she wanted to, if she didn't hit the piling. It wouldn't hurt anything.

Q. Were you sitting in the court room when some of the Barry K's witnesses testified to the effect of a displacement swell? [578]

A. No, I wasn't.

Q. Well, if an ocean-going steamer were coming down on the range, there, and entering that channel and, say, going seven knots and half loaded, how much of a displacement swell would she make?

A. You mean how would it affect the barges or the tow?

Q. Yes.

A. Well, it would depend on how close they passed.

Q. Well, suppose they passed two hundred feet apart?

A. She wouldn't notice any swell two hundred feet away.

Q. How close would you regard it as safe for those two vessels to pass each other port to port?

(Testimony of William Lumm.)

A. Well, it is safe about a hundred feet, is practical. Of course, they usually leave more room than that, but if they were a hundred feet apart, we'll say.

Q. What is the comparative difficulty of navigation in that channel by a tug and tow, and the same tug and tow going through the harbor, here, of Portland through the bridges?

A. Well, it is a good deal closer working through the bridges than it is down there. You have got much more room down there.

Q. And how do those waters of Post Office Bar channel compare with the waters between here and Oregon City in respect to difficulties of navigation?

A. Well, there is no comparison. There is some quite bad water between here and Oregon City in certain stages of the river.

The Court: What is bad, did you say? [579]

A. Quite bad water up there at certain stages of the river.

Mr. Wood: I think that is all.

Cross Examination

By Mr. Young:

Q. Captain Lumm, I did not understand what you said with regard to by whom you are now employed.

A. I am not employed.

Q. How long has it been since you were last employed?

A. About seven months.

Q. And by whom were you employed the last time?

A. Matson Navigation Company.

(Testimony of William Lumm.)

Q. That was to pilot one of their vessels?

A. Yes, sir.

Q. Prior to that time you have been employed from time to time by different companies, have you?

A. Yes, sir.

Q. Captain Lumm, you testified that it was your observation during the past thirty years that log rafts always use the east side of the river in the vicinity of Post Office Bar. Am I correct about that?

A. Yes, I think that practically all of them use the east side.

Q. Did you ever tow a log raft yourself?

A. Very few.

Q. Well, did you ever tow a log raft past Post Office Bar?

A. No, I don't believe I ever did. [580]

Q. Do you know why it is that the log rafts have made it a practice to use the east side of the river at Post Office Bar?

A. Well, it is a little easier water on that side and they keep over there. Formerly it was shallower over there and they kept over there to keep out of the way of the boats and so forth.

Q. To keep out of the way of what boats?

A. All boats.

Q. All boats. Well, it was a good idea, was it not?

A. Well, I suppose it was. I don't tow logs.

Q. You say there is shallow water over on that side?

A. Used to be.

(Testimony of William Lumm.)

Q. Well, even at the present time what is the depth of the water right up against the bank on the east side of Post Office Bar, do you know?

A. Well, it runs from thirty feet up to nothing.

Q. How far out do you have to go before you get to the thirty-foot depth, measuring it out from the east bank?

A. I think about a hundred or 150 feet.

Q. 150 feet. You would not think that 400 feet would be the correct distance in that regard?

A. Not there, I wouldn't.

Q. Not there. What do you understand to be the width of the ocean-going ship channel at that point?

A. Approximately eight hundred feet?

Q. Well, how much depth are you assuming in that distance of eight [581] hundred feet?

A. Thirty feet.

Q. Thirty feet. Well, there are lots of ocean-going ships that draw more than thirty feet of water that use the Willamette?

A. Not lots of them, no.

Q. There are some, at least?

A. Perhaps some.

Q. And there are at least lots of vessels that draw close to thirty feet of water, are there not?

A. Yes.

Q. Ocean-going ships drawing 28 or 29 feet of water would not be traveling in a thirty-foot channel, ordinarily, would they?

(Testimony of William Lumm.)

A. No, they wouldn't. But that thirty-foot is at zero stage.

Q. Well, the ship might have to be using the channel at zero stage, might it not? A. Yes.

Q. Assuming that there were thirty feet of water in the channel, you, piloting a vessel drawing, say, 27 or 28 or 29 feet, would not care about being in that channel, would you?

A. I wouldn't from choice unless it was necessary.

Q. Do you know what the width of the 35-foot channel is?

A. I think it is about—it is at least 600 feet.

Q. And that is true at Post Office Bar?

A. Yes.

Q. Now, have you operated or piloted towboats that were pushing [582] barges either up or down the river opposite Post Office Bar?

A. Yes, sir.

Q. And which side of the river did you use?

A. Either side.

Q. Either side? A. Yes.

Q. Well, now, why did you not stay over on the right-hand side going up, for example?

A. Well, sometimes I had a boat that didn't have very much power, and if I stayed over there I didn't get anywhere.

Q. You didn't get anywhere? A. No.

(Testimony of William Lumm.)

Q. That is, you mean you did not get anywhere over on the right-hand side going upstream?

A. There was a little more current over there. I got over on the other side to get out of the current.

Q. What variation in current would there be between the west side and the east side at that point?

A. Oh, I imagine you could make a difference there of at least a mile an hour, perhaps more.

Q. Would that small difference make any difference to you in the operation of a towboat?

A. It certainly would.

Q. Why so?

A. Because you wouldn't make over a couple of miles an hour at the best. [583]

Q. By what kind of engines were these towboats powered?

A. Steam.

Q. Steam?

A. And diesel.

Q. Steam and diesel. Now, when you were piloting a steam vessel, what did you do about this Article 25 of the Pilot Rules which talks about staying on the right-hand side of narrow channels?

A. I forgot about it.

Q. You forgot about it. Yes. Now, exactly what danger would there be to you, however, in bucking a current over on the west side?

A. No danger.

Q. Well, you said that you wanted to get over on the east side to get out of that current.

(Testimony of William Lumm.)

A. Yes, sir.

Q. Well, the current must have affected you in some way that it would cause you to want to go over there.

A. It slowed me down.

Q. Slowed you down?

A. Yes.

Q. If you happened to have, in addition to that current, a stiff east wind, what would that do to you, coming up past Post Office Bar?

A. Well, it would depend on what kind of a tow you had.

Q. Suppose you were pushing either one or two barges.

A. Well, I suppose you infer there to a high house, do you?

Q. Did you ever push a barge with a high house? [584]

A. Yes.

Q. Did you ever push any barges up past Post Office Bar with houses that were as high as these the Barry K was pushing?

A. Yes, I have.

Q. How high would you think those barges were, the houses?

A. A rough estimate, I would think were about ten feet, maybe twelve.

Q. If you were informed that the testimony in the case shows they were twenty feet above the water line, would that make any difference?

A. I had reference to the house.

Q. How much then were you allowing for the barge, itself?

(Testimony of William Lumm.)

A. Well, the barge, I imagine, was about a ten-foot hole, eight- or nine-foot hole, something like that.

Q. That includes the part that was under the water, does it not? A. Yes.

Q. The testimony in this case is that the tops of the houses stood about twenty foot above the water line. A. Yes.

Q. And the barges were roughly 150 feet in length. The Barry K, itself, was 165 feet, and with one barge on her nose she was about a total of 305 feet in length over-all. Would you think that would offer considerable wind resistance?

A. Yes, it would.

Q. And the greater the wind resistance, or the stronger the wind, rather, the greater the wind resistance. Is not that true? A. Yes. [585]

Q. Suppose that you were proceeding upstream with a towboat and barges of that nature, what would the tendency be of an east wind if you were over on the right-hand side of the stream?

A. Well, it would be a tendency to blow her stern around a little.

Q. Now, are you familiar with the existence of a dike over there on the west side of the river?

A. Quite familiar.

Q. Quite familiar? A. Yes.

Q. That is not a very nice thing for a river boat to run into, it is? A. Oh, no.

Q. You mention in your testimony that if you

(Testimony of William Lumm.)

just missed it why everything would be all right, did you not? A. Yes.

Q. When you are operating a towboat, do you operate under such circumstances that you are going to just miss obstructions on the river?

A. Well, lots of times we run pretty close to them.

Q. You do not like to do that, do you?

A. Not unless it is necessary.

Q. Well, it is dangerous to do that, is it not?

A. Not if you can see them, it isn't.

Q. In the nighttime it is not so easy to see that dike, is it? A. No.

Q. And therefore you would like to stay farther away from the dike [586] at night than you would in the daytime, would you not? A. Yes, sir.

Q. As a matter of safety in the operation of a towboat and barges, is it not true that you do not run as close to physical objects in the water as you possibly could to see how close you can get without hitting them? A. No.

Q. You do that, do you?

A. No, we don't.

Q. You do not do that? A. No.

Q. You have to allow for a factor of safety, do you not, Captain? A. Yes, sir.

Q. In the case of a low-powered boat, then, pushing barges upstream past Post Office Bar and staying on the right-hand side, there would be more hazard to it than there would be if it were over on the east side. Is not that true?

(Testimony of William Lumm.)

A. Oh, no. I don't think so.

Q. You don't think so? A. No.

Q. You took some considerable time in answering that question, Captain. What did you have in mind?

A. Well, I couldn't see why there should be any more hazard on the west side than the east side.

Q. You couldn't see any more hazard. Is there any dike over on the [587] east side to run into?

A. Not right there, there isn't.

Q. What do these river boats ordinarily draw?

A. From a foot and a half to about five or six.

Q. And what do these barges ordinarily draw?

A. Approximately six feet, seven.

Q. In what depth of water would it be safe to operate those barges and river boats?

A. Why, they operate them as long as they will float.

Q. You could operate those boats of that sort way over against the east bank, could you not?

A. Yes.

Q. You could not do that with the ocean-going ship, could you?

A. Not right against the bank, no.

Q. Well, you would have to stay out a considerable distance from the bank, would you not?

A. Oh, you would stay out a couple or three hundred feet.

Q. You have testified that in a case of river boats generally past Post Office Bar, some of them

(Testimony of William Lumm.)

you say stay on the east side and some are on the west side. Is that right?

A. (The witness shook his head "Yes.")

Q. Why is it that river boatmen have adopted that practice of using the east side at all?

A. Well, it is a little shorter, is one reason.

Q. What other reason? [588]

A. Well, it is a little less current over there.

Q. Is it not true that boats over there are out of the way of ocean-going ships that would be using the main channel?

A. Well, they used to be years ago, the ocean-going boats favored the west side a little more.

Q. They can go a little bit farther east now than they could formerly?

A. Yes.

Q. Nevertheless, does not the ocean-going ship prefer to favor the middle of the channel under circumstances?

A. Well, of course, not under any circumstances. They do.

Q. And why do they?

A. Well, it has got more room. They are safer there. They don't need to watch so close.

Q. For an ocean-going ship going downstream and staying, let us say, in the center of the main channel, there would be ample room between it and the east side for a river barge pushing barges to pass, going upstream, would there not?

A. Yes.

(Testimony of William Lumm.)

Q. When you are pushing barges upstream, do you ever have occasion to stop? A. Oh, yes.

Q. Well, now, suppose that you were going up on the west side opposite Post Office Bar and you were suddenly compelled to stop. What would happen? What would be the tendency of your boat under those circumstances?

A. Well, it depends on the conditions of the weather and the river [589] and the tow and various things.

Q. Yes. Well, if you had a breeze of, say ten to fifteen miles an hour from the East, what would be the tendency of that?

A. Well, we would stop and lose headway. It would blow you ashore, eventually.

Q. What would the current tend to cause you to do?

A. Well, it would tend to drift you downstream.

Q. It would drift you over against the west side, would it not?

A. Not necessarily the current.

Q. You testified there is a stronger current on the west side than on the east side, did you not?

A. Yes.

Q. Would not the effect of that current then be to tend to cause you to go over toward the east side? A. Not necessarily.

Q. Not necessarily?

(Testimony of William Lumm.)

A. (The witness shook his head "No.")

Q. You testified that river boats—that is, tugs with barges—will pass through the bridges here in the Portland harbor. Is that right? River boats will push barges through the draws of the bridges in Portland harbor? A. Certainly.

Q. As a matter of fact, when a river towboat is pushing, say, a couple of barges through one of these draws, what speed does it ordinarily travel?

[590]

A. It depends how she is made fast to the barges. If she has got a barge on each side it makes a rather wide tow and she usually slows down as she enters into the draw.

Q. Is it not a fact that she will drift through?

A. No, it depends on what the conditions of the river are and so forth.

Q. Well, if you were operating a river towboat with two barges, one on the nose and the other, let us say, on the port side, and, say, you had a half-mile to a mile of current in the river at the point, would you or would you not drift through the draw?

A. I wouldn't drift through.

Q. Well, what would you do then?

A. It would depend on which way I was coming.

Q. Suppose you were going upstream.

A. Well, I would go right along just the same as if there was no bridge there.

Q. At what speed? A. Full speed.

(Testimony of William Lumm.)

Q. Full speed? A. Yes, sir.

Q. What do you mean by "full speed" in miles per hour?

A. Well, as fast as the boat could go.

Q. Would you go full speed irrespective of the amount of clearance you had on either side of your barges as compared with the bridge?

A. Well, if I had a barge on my nose and one alongside, I would [591] know it would be approximately eighty feet wide, the tow.

Q. And what is the width between the draw, the opening in the draw, let us say at the Morrison Bridge? A. Approximately 150 feet.

Q. And if you had a towboat with two barges, which, we will say, were eighty feet in width, would you go through that draw at full speed?

A. Certainly.

Q. And how many miles per hour would you figure that to be?

A. As fast as the boat would go.

Q. Well, what do those speeds run?

A. Oh, they probably go about—a boat with good power would make—maybe make seven miles, six or seven miles an hour in slack water.

Q. You mentioned that the difficulties of operating in the river between Portland and Oregon City are, if anything, more serious than those down around Post Office Bar. A. Yes.

Q. Well, as a matter of fact, Captain, do ocean-

(Testimony of William Lumm.)

going boats ever go above the Ross Island Bridge anyway? A. No.

Q. So the problem of passing on the river between an ocean-going boat and a river boat does not exist above the Ross Island Bridge? A. No.

Q. You testified that at a distance of 200 feet away from an ocean-going ship going downstream at Post Office Bar you would not notice [592] any swell. Is that correct?

A. I don't know as the word "swell." I took it that it was the——

Q. I made a note you said you did not notice any swell. You meant displacement swell, did you not? A. I think so; yes, sir.

Q. Would it not, however, depend upon the speed of that ship as to how great a distance the displacement swell would stretch out on either side? Is that right? A. Yes.

Q. If a downstream vessel, or the vessel traveling downstream were going, say, twelve knots, she would throw out a lot more water on either side than if she were going only six, would she not?

A. Yes.

Q. Would you think that your two hundred feet of clearance would be adequate if the downstream vessel were traveling, say, twelve knots an hour?

A. Yes.

Q. You think it would? A. Yes.

Q. You mean the river boat would not feel the displacement swell at all?

(Testimony of William Lumm.)

A. It would shake him up a little bit but it wouldn't affect anything, wouldn't hurt anything.

Q. These barges are fastened to the towboats by cables, are they not, ordinarily? [593]

A. Well, cables or lines.

Q. Lines of one sort or another? A. Yes.

Q. You do not want any play, do you,—

A. No.

Q. —between your barge on the one hand and the towboat on the other?

A. (The witness shook his head "Yes.")

Q. And in so far as you have to encounter one of those swells, you run the hazard of those lines parting, do you not?

A. They very seldom part.

Q. Well, you said a moment ago that you do not care to run that risk, though. Is not that right? That is a real risk, is it not?

A. Oh, there is a certain risk.

Q. Have you ever been operating a towboat with barges upstream past Post Office Bar on the right-hand side of the stream at the time when you regarded it as unsafe to do so? A. No.

Q. Never have? A. No.

Q. Have you ever been in there when there was a stiff east breeze blowing? A. Yes.

Q. And you did not think it was unsafe even then? A. No.

Q. Have you ever been there in stormy weather? [594]

(Testimony of William Lumm.)

A. All kinds of weather.

Q. All kinds of weather? A. Yes.

Mr. Young: That is all.

Mr. Wood: Your Honor, I had only two or three questions. I should like to finish with the witness, if I could.

Redirect Examination

By Mr. Wood:

Q. Captain Lumm, in reference to the question of counsel as to whether you are employed at the present time, you said you had not been employed for the last seven months. Unless you have some personal objection to it, I want you to tell what was the cause of your cessation of employment.

A. Well, the union put out a picket line around the ship. The ship could not move.

Q. And you were pilot on that ship?

A. Yes.

Q. And this union picketed you, picketed the ship on account of you? A. Yes.

Q. And you were taken off the ship so the ship could move? A. That is right.

Q. Are all members of the Columbia River Pilots Association members of that union?

A. I think they are.

Q. Now, you said that sometimes steamers favor the center of the [595] channel. I do not know whether you were referring to this particular channel generally down the Columbia River, but that

(Testimony of William Lumm.)

does not make any difference. If they do favor the center of the channel they are really violating the rule which requires them to keep on the starboard side, are they not?

A. Well, they are, technically, yes.

Q. And if an ocean-going steamer came down this particular channel and favored the center, you said there would be room between here and the east bank for a tug and tow to pass? A. Yes.

Q. It is perfectly obviously true. But I wanted to ask whether there would likewise be room on the west side. A. There would.

Q. For the tugboat to pass? A. Yes.

Mr. Wood: That is all.

Recross Examination

By Mr. Young:

Q. On the west side the channel comes over nearer to the bank, does it not, than on the east side? A. I think a little bit closer.

Mr. Young: One further question I want to ask this witness that I omitted to, your Honor.

Q. Captain, have you operated or piloted tow-boats down the Columbia [596] River as well as in the Willamette? A. Yes, sir.

Q. Well, are there not a number of places along the Columbia River where it is the practice for the river boats to stay on the left-hand side of the stream rather than on the right-hand side?

A. I don't know as it is with barges. They go

(Testimony of William Lumm.)

wherever they feel like it. They don't observe any rule.

Q. Don't observe any rule? A. No.

Q. Well, as a matter of fact, do you know, for instance, over near Mount Coffin, Washington, is there not a place over there for about half a mile where the river boats stay on the left-hand side?

Mr. Wood: I object to it as immaterial anyway.

The Court: He may answer. With tows, near Mount Coffin, what do the river boats with tows do, what side do they go on?

A. Well, they—I believe they do, yes.

Mr. Young: Q. Is not the same thing true for a distance from the lower end to the upper end of Batchelor's Island near St. Helens?

A. Yes, it is.

Q. And is not the same thing true from the Cleveland Dike to Walker's Island near Stella, Washington? A. Yes, it is.

Q. And is not the same thing true from Reeder's in the Columbia to St. Johns in the Willamette?

A. No, I don't think so. [597]

Q. How about from the mouth of the Willamette to Vancouver, to the first bridge?

A. Well, they go right up the center of the channel, there.

Mr. Young: That is all.

Mr. Wood: Is your Honor going to hold court until one o'clock? When is your Honor planning to adjourn today?

The Court: What was the next statement you made?

Mr. Wood: Captain Hosford just whispered in my ear that he understood we were going to hold court until one today.

The Court: Let us decide it now, regardless of prior understanding. How many more witness will you have, Mr. Wood? About how many?

Mr. Wood: I think I will only have one more immediately that is in the court room.

The Court: How much rebuttal, Mr. Young?

Mr. Young: Well, I will have three or four witnesses, your honor, but they will be short.

Mr. Wood: I said only one more now in the court room. I will have quite a number of witnesses, yet, but I have not brought them up here yet.

The Court: Let us work another hour then.

Mr. Wood: That is all.

(Witness excused.) [598]

L. O. HOSFORD,

produced as a witness in behalf of the Respondents, being first duly sworn, testified as follows:

Direct examination

By Mr. Wood:

Q. Captain Hosford, you are a resident of this city, are you not? A. Yes, sir.

Q. And what is your employment?

(Testimony of L. O. Hosford.)

A. I am a pilot for the American-Hawaiian Steamship Company.

Q. You are a regular pilot for the company?

A. Yes, sir.

Q. Piloting for that company only at the present time? A. Yes, sir.

Q. In other words, you are employed steadily on a salary as distinguished from these pilots who take a ship out for anybody when they are called.

A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. Is that correct?

A. Yes, sir. I do no other work for the American-Hawaiian Company.

Q. How long have you been working in that capacity for the American-Hawaiian?

A. Since the 1st of April, 1938.

Q. Are you a member of the Columbia River Pilots Association? A. No, sir. [599]

Q. What has been your experience to qualify you as a Willamette and Columbia River pilot?

A. Well, my steamboat experience started in 1906, and, with the exception of possibly two years' service at sea I have been constantly on the river ever since. Master, starting from a deck hand up to master of all various types of river vessels and towboats and passenger and freight boats.

Q. Your own family was in the towboat business, was it not, or river transportation?

A. In river transportation; yes, sir.

(Testimony of L. O. Hosford.)

Q. The Hosford Transportation Company?

A. It was the Harkins Transportation Company.

Q. What? A. Harkins.

Q. Well, how long have you acted as master or pilot of river steamboats?

A. Since 1909.

The Court: What was that name you called a minute ago?

(The reporter answered "Harkins.")

A. H-a-r-k-i-n-s.

The Court: Mr. Wood asked if your family was in the towboat business.

A. The Harkins Transportation Company operated freight and passenger busses, not towboats.

The Court: He asked you if they were your family. Were they your family? [600]

A. My father was founder of the Company, yes.

Mr. Wood: Q. And have you handled towboats and tows— A. Yes, sir.

Q. —similar to the one here shown in these photographs? A. Yes, sir.

Q. Has your experience in that been extensive or only on isolated occasions?

A. Well, I have had quite a little experience on towboats.

Q. Extending over years? A. Yes, sir.

Q. Are you familiar with the Post Office Bar channel? A. Yes, sir.

Q. Do you remember its successive stages of

(Testimony of L. O. Hosford.)

development so that you could give us briefly its history?

A. Well, as I remember as a young fellow when I first started steamboating, I don't know the exact width of the ship channel in there, but it was very narrow, approximately 250 or not to exceed 300 feet at the most, and the right bank of the river, right half of the river at that time was quite shoal.

Q. And then——

A. Gradually in different stages it was widened out, the ship channel, to its present width.

Q. You mean the Government dredging has widened it out? A. Yes.

Q. And its present width is what? [601]

A. Well, a 35-foot channel from six to seven hundred feet in width. In that particular locality thirty feet is eight hundred feet.

Q. Did you hear the testimony of Captain Lumm which he just gave about places on the Columbia River where tugs and tows left the ship channel and passed on the left-hand side?

A. Yes, sir.

Q. What? A. I did, yes.

Q. I did not make a note of all of those places, but I will ask you whether they are similar and comparable places to this one at Post Office Bar.

A. No, they are not.

Q. In what respect do they differ?

A. Well, the river is much wider at those points. The points that were mentioned are from

(Testimony of L. O. Hosford.)

a half a mile to a mile, and a mile and a half away from the ship channel.

Q. Now, what can you inform the Court as to the safety and practicability of this Post Office Bar channel for ships to pass port to port there?

A. It is safe and practicable, and they have always done it.

Q. Ocean steamers always pass that way?

A. Yes, sir.

Q. They did even in the old days when it was narrow, did they not?

A. Yes, sir.

Q. And how easy is an ocean steamer to handle in comparison with a [602] river steamboat and a tow.

A. Well, I wouldn't say it is as easy as a river boat and tow.

Q. Not as easy?

A. No.

Q. Now, you have answered about ocean steamers passing. What is your opinion as to whether it is safe and practicable there for a river steamboat with two barges ahead of her, as in this case, to pass a down-coming steamer port to port? Is that safe and practicable?

A. I consider it safe and practicable; yes, sir.

Q. What advantage has that law, Captain Hosford, to pass to the right, in giving pilots a right to rely certainly on what the other ship is going to do?

A. Well, in a narrow confined channel, especially one in a bend, one vessel is showing the other

(Testimony of L. O. Hosford.)

vessel your green light in the bend until they straighten up and line up with each other.

Q. Yes.

A. Were it not for a rule such as that, I would consider that there would be more or less of a doubt as to which side or the other that either vessel was going to take, and with a heavily laden ship or deep draft, you pretty near have to make up your mind what you are going to do a little ahead of time. You can't change the course of a heavy vessel like that, like you can a river boat with a tow, and once you start to do anything why you pretty near have to follow through what you have started, and where you know that a vessel is going to keep to the right-hand side why you have that [603] sense of security and feeling of security that there will be no accident as long as each—the other fellow follows the rule the same as you intend to.

Q. You are familiar with the Barry K, are you not?

A. Yes, sir.

Q. You know her well, do you not?

A. Well, I know her. I have never been aboard her—I have never worked on her.

Q. You have seen her many times on the river and you have seen her towing barges, have you not?

A. Yes.

Q. If she were coming up on the Post Office Bar channel with a couple of barges, as shown in these photographs, and kept to her own right-hand side and came up the west side, how much clear

(Testimony of L. O. Hosford.)

water would she leave for the passage of the down-coming Pennsylvanian?

A. Well, she could—coming up the right-hand?

Q. Yes. A. Her right-hand side?

Q. Yes.

A. Well, she could, with safety, leave four hundred feet of the 3500-feet—or the 35-foot channel, which is more than we have in some places all told on the lower river.

Q. Now, you perhaps have heard the testimony on this night there was a 10- to 15-mile breeze blowing from the East. You heard that testimony? [604] A. Yes, sir.

Q. How serious a handicap would that be to the Barry K and her barges?

A. Well, I would say a 10- to 15-mile breeze is practically negligible.

Q. Would the Barry K have to angle out into the stream coming up there to counteract that breeze?

A. She probably would maybe half a point, maybe three or four or five degrees, not to exceed that, I wouldn't say, especially a loaded barge.

Q. How close could the Barry K go with her tow to the right-hand side bank and with the piling there, and be perfectly safe coming up?

A. Well, if he would give himself a hundred feet away from the dike would be ample room, as a safety factor.

(Testimony of L. O. Hosford.)

Q. By "the dike," you mean that odd piling that is strung along there?

A. Yes, along the west bank.

Q. How much effect on the tug and tow would the displacement swell of the Pennsylvanian have, if any?

A. Well, at seven knots she wouldn't have any.

Q. And how about this talk of the kick water? What have you to say about that?

A. A hundred feet away from the vessel there would be no effect from that either.

Q. Would you like to amplify that a little and explain why there [605] would be no effect from the kick water a hundred feet away?

A. Well, a vessel making a right turn, the majority of the weight from the wheel with a right rudder would be thrown away from the tow, were she passing to the right of the other vessel. And the other—

Q. You do not mean "passing to the right of the other vessel."

A. Well, on her left-hand side, port to port. With the rest of the weight to the wheel it would go directly astern to her, not over the width of the ship. A tow would have to practically cut right in behind the ship to get—to feel any effect from the weight from the wheel. I never heard it called kick water. That is a new term to me.

Q. You know what they mean, the thrust from the propeller?

(Testimony of L. O. Hosford.)

A. Yes, I learned what they mean.

Q. It is not as easy for a ship, especially a large ship like the *Pennsylvanian*, to go into a bend with a downstream current behind her as it is to go through the same bend with the current against her, it is?

A. No, it is not.

Q. And if she has the current with her, she is harder to handle, is she not?

A. Yes, sir.

Q. What do you think would be the comparative ease with which the *Barry K* could come up against that current on the right-hand side and the *Pennsylvanian* could go down with the current on that west side? [606]

A. I think the *Pennsylvanian* would run a greater hazard in hugging in on the west side than the tugboat would coming up?

Q. Why?

A. Because the current would naturally have a tendency always to flow into a bend and as the ship swung around, making the right turn, why she is longer, she is over four hundred feet long, and her stern would naturally have a tendency to drift in towards the west bank, more so than the towboat coming up.

Q. Suppose she had to stop and reverse there in a sudden emergency, as meeting another ship coming up, or anything you please. How would she swing?

A. Back to port. Her bow would swing off to starboard.

(Testimony of L. O. Hosford.)

Q. Out into the channel?

A. Yes, sir. If the vessel was swinging any to the right when you started backing, nothing could stop her from continuing to swing to the right. She would swing faster all the time.

Q. What effect would that have on a possible collision with an up-coming ship?

A. The minute you started backing the ship why your only chance is to get her stopped before you hit, because you have got no chance to stop her from swinging. She will continue to swing farther to the right.

Q. She would swing into the up-coming ship under those conditions? A. Yes, sir.

Q. I think I have covered all the different reasons they have advanced [607] but I will ask you a general question, whether or not in your opinion it was safe and practicable for the Barry K and her barges and the Pennsylvanian to pass port to port on that night as you have heard the conditions described.

A. I do think it is absolutely safe and practicable.

Mr. Wood: You may cross examine.

Wait just a minute, please. I forgot something.

Q. Captain Hosford, since this collision we were talking about, have you seen Western Transportation Company's towboats and barges passing steamers in that same channel?

Mr. Young: At what time?

(Testimony of L. O. Hosford.)

Mr. Wood: First I will ask him if you have seen them pass.

A. Yes, I have passed them myself on a number of occasions.

Q. How have you passed them?

A. Port to port. A majority of them port to port since the accident.

Q. In other words, the tug and the tow of this Libelant have come up on the right or the west side, there? A. Yes, sir.

Q. And you have gone down on the east side?

A. Yes, sir.

Q. Now, Mr. Young wanted to know what times those were.

A. All times, day and night both.

Q. Has there been any difficulty about making such a passage?

A. I have found none.

Q. Have you passed other tugs and tows in there? [608]

A. Yes, sir.

Q. Likewise port to port? A. Yes, sir.

Q. Besides the Western Transportation Company's tugs?

A. Yes, sir. I think I have passed more tows with barges port to port than I have starboard to starboard since the accident.

Q. Before the accident—I am not speaking of Western Transportation Company, now, but tugs and barges generally—how has the passage been?

(Testimony of L. O. Hosford.)

A. I would say a large majority have passed starboard to starboard.

Q. And some the other way?

A. Occasionally, yes.

Q. I think it is clear, but when you made these passages that you have just talked about, you were piloting an ocean steamer going down, were you not?

A. Yes, sir.

Mr. Wood: That is all.

Cross Examination

By Mr. Young:

Q. Captain Hosford, you testified that subsequent to the time of this accident, you had seen boats of the Western Transportation Company passing port to port at Post Office Bar.

A. I have passed Western Transportation Company boats port to port since the accident.

Q. At Post Office Bar? [609]

A. Yes, sir.

Q. Now, when was the first occasion when you did that?

A. I don't recall the exact dates, Mr. Young. I have passed a number of them. I think more—we have passed more than I have the other way.

Q. What is the first boat that you did pass?

A. I don't recall the first one. I have passed the Barry K since that port to port and the Claire.

Q. At Post Office Bar?

A. Yes, sir, with barges.

Q. With barges? A. Yes, sir.

(Testimony of L. O. Hosford.)

Q. Was that daytime or night? A. Both.

Q. Both times? A. Yes, sir.

Q. And do you remember when those times were?

A. No, I can't recall the dates.

Q. Do you know any other boats of the Western Transportation Company that you have passed at Post Office Bar port to port since the accident?

A. Pardon?

(The last question was read by the reporter.)

A. Yes, I have passed the Patricia with barges.

Q. Any other boat? [610]

A. I can't recall any other, no.

Q. What boats have you been on at the times that you have been making these passages?

A. I can't say that. I didn't make a log of it or a note of it.

Q. Were you a pilot on the boat that was doing the passing? A. Yes, sir.

Q. Were they American-Hawaiian ships?

A. Yes, sir.

Q. Is that as closely as you can get to the identity of the boats and the times when you made these passages port to port?

A. I didn't pay any attention, Mr. Young.

Q. You didn't pay any attention to it?

A. That is, to the time and date. I didn't make a note of it.

Q. Do you know who the pilots were on those boats of the Western Transportation Company?

(Testimony of L. O. Hosford.)

A. No, sir; I do not. I do remember two weeks ago passing the tug Melville right in that same spot where the accident occurred port to port with three loaded sawdust barges.

Q. The port tug Melville?

A. Yes, sir.

Q. Who owns the Tug Melville?

A. Knappton Towboat Company.

Q. Prior to the time of this accident, what do you say was the practice for river boats in making passages at Post Office Bar in passing ocean-going ships? [611]

A. I would say the majority of them passed starboard to starboard.

Q. Starboard to starboard. That is to say, the majority of them stayed over on the east side?

A. Held the east side; yes, sir.

Q. Why did they do that, do you know?

A. Well, it is easier going over there, and there is a little more room if a fellow gets clear over against the east bank. He knows that a ship can't get over there and hit him.

Q. In other words, there is no possibility of a collision if he is over there far enough. Is not that true?

A. If he is far enough over, that is true.

Q. Because the ocean-going ship would run aground first? A. Yes.

Q. You testified that you have handled quite a few towboats. Now, for whom have you handled any towboats?

(Testimony of L. O. Hosford.)

A. Well, I worked quite a lot for the Western Transportation Company.

Q. During what period of time?

A. Well, I worked a year or more back in 1914 and '15—or '13 and '14, I guess it was; in that vicinity.

Q. Were you handling towboats for them then?

A. Yes, sir.

Q. In '13 and '14? A. Yes, sir.

Q. What other time?

A. And then I was two or three different times. I worked for them in 1937. [612]

Q. How long? A. A couple of months.

Q. For a couple of months in '37?

A. I think it was. And I worked in '36 or so for about the same length of time.

Q. Well, now, for whom besides Western Transportation Company have you ever operated towboats? A. Shaver Forwarding Company.

Q. When did you work for them?

A. I think it was '36.

Q. How long?

A. Oh, a short while. A month, or about two months.

Q. Now, for what other companies have you operated towboats?

A. Well, I worked for Drake O'Reilly. He towed barges altogether. That is about all of the companies that I worked for as Master or pilot.

Q. Now, out of your total experience on the

(Testimony of L. O. Hosford.)

river, adding it all up together, how many months or years would you say you have actually piloted towboats? A. Two years.

Q. Two years. And you have been on the river altogether how long?

A. About thirty—since 1906.

Q. Since 1906. And all of the time then except those two years, what sort of boats were you operating?

A. Freight and passenger boats. [613]

Q. The problems of operating freight and passenger boats are somewhat different from towboats with barges, are they not? A. Yes, indeed.

Q. You have testified that there is an advantage in this law of requiring the passage always to be on the right because pilots who are coming up and down the stream always know what to expect at any particular place. Is that right?

A. Yes, sir.

Q. However, if there is a custom that has existed for many years at any particular place on the river to the effect that the passage would be starboard to starboard instead of port to port, there is no hardship on the pilots as to that particular place, is there?

Mr. Wood: I object to the question. It is well settled that a custom cannot override the laws; probably twenty decisions on that.

Mr. Young: That is not correct, your Honor, particularly if the custom is based upon factors of

(Testimony of L. O. Hosford.)

safety and practicality. We have already put on testimony in that regard, and this is cross examination of this witness at this time.

The Court: Do you expect to have opposing authority?

Mr. Young: Yes, your Honor.

The Court: He may answer, subject to the objection.

(The last question was read by the reporter.)

Mr. Wood: I also object to that as argumentative.

Mr. Young: I call the Court's attention to the fact that [614] counsel, himself, asked the question as to whether having the law provide that the passage shall always be port to port is practical. This is simply asking the question in the other form as to starboard to starboard.

The Court: Answer, Captain.

A. If the pilot knew definitely that the towboat was out of the channel why there would be no hardship on him passing starboard to starboard, no.

Mr. Young: Q. As a matter of fact, the pilots of ocean-going ships would be very happy to have all of the towboats out of the channel, would they not? A. Yes, indeed, they would.

Q. And the reason for that is that there is no possibility then of a collision. Is not that true?

A. Yes, sir.

Q. As a matter of fact, is not that one of the

(Testimony of L. O. Hosford.)

circumstances that has caused the pilots of river boats to use the east side of the river down past Post Office Bar?

A. That used to be in effect when the channel was narrower, yes.

Q. It is still in effect, is it not?

A. I wouldn't say that it was, no.

Q. You would not say that it was?

A. There is practically as many go the other way as there is the east side.

Q. And how long has that been true? [615]

A. Well, it has been mostly true since this accident. It has made a very mean condition in that bend since this accident, because you don't know where they are going, now.

The Court: What was your last word or two?

A. You don't know where they are going, now. Some of them pass you to port and some to starboard. It has created a very difficult situation.

Mr. Young: Q. In other words, if they would all stick to the old custom, there would not be any such problem?

A. One or the other, if they would stand by the rule.

Q. One or the other. Either port to port or starboard to starboard. Is that right?

A. Yes, sir.

Mr. Young: If the Court please, I do not want to have this witness dismissed completely from the trial, here. There may be some further questions

I should like to ask him on cross examination, but I have got to do some checking before I can do that.

The Court: Do you want to defer your redirect, then, Mr. Wood?

Mr. Wood: Yes, I think so.

The Court: Just what is your position going to be as to the effect of custom on the rule,—step down, Captain—Mr. Young? That it abrogated the rule?

(Witness withdrawn.) [616]

Mr. Young: In the first place, your Honor, the rule expressly provides that the passage may be other than port to port if it is neither safe nor practicable to pass port to port. We have already put on a very substantial amount of testimony on that point, that it is neither safe nor practicable under the circumstances present at this place for a port to port passage to be made, and that it is neither safe nor practicable for the river boats to use the west side of the stream. Now, if your Honor believes that testimony, then there is no question of a violation of the rule involved. We fall directly under the rule, because the rule expressly says that you will pass port to port when safe and practicable, but if it is neither safe nor practicable then you do something else, of course,—in this case pass starboard to starboard. Now, that is the first point.

The second point is that of a long-established custom as to the use of the river by river boats on

the east side being well known to all of the pilots in this particular river, and that, that being the situation, when the Pennsylvanian met the Barry K at the time this collision occurred, the pilot of the Pennsylvanian was charged with knowledge of the existence of that custom and was not to be met by any surprise when he found the Barry K over on the east side of the stream.

The Court: He says he did not know where she was.

Mr. Young: Well, that is a matter for your Honor to pass upon. He said that he did not know where she was, but the fact of the [617] matter is he has placed there on the map indicating where she was. If your Honor believes that is where he saw her, it is perfectly obvious she was over on the east side. Moreover, our testimony has been very definitely that we had ample lights on the Barry K, that we had lights on the forward corners of the barges, and all of those are circumstances for your Honor to give consideration to in determining the exact position of the Barry K.

The Court: Well, at a mile, conceding the lights for the purpose of the argument, would that place her form at one side or the other to him?

Mr. Young: Would you state that again?

The Court: At a mile's distance, would he know which side she was on?

Mr. Young: A man who has been piloting on the river for years should know where the boat is when he is looking at the lights. That is correct, your Honor.

Mr. Wood: May I interject that Captain Reed said he could not tell which side the other ship was situated on?

Mr. Young: Captain Reed testified that the Pennsylvanian was on the Post Office Range and that she left the Post Office Range at a point earlier than ships ordinarily did leave the Post Office Range when she was coming downstream.

The Court: Earlier than he expected her to?

Mr. Young: That is right.

Mr. Wood: He also said he could not tell. [618]

Mr. Young: He had to see her in order to testify about that, your Honor.

The Court: You did not finish your statement about the custom.

Mr. Young: I thought I had, your Honor. I stated in the first place that there is evidence in this case from which your Honor can probably conclude that it was neither safe nor practicable for the river boats to go up the east side of the river.

The Court: What is your alternative position?

Mr. Young: The alternative position is, your Honor, that if the custom existed and the custom was well established and was known generally throughout this territory by pilots, then when a pilot of an ocean-going ship going downstream saw what he, as Captain Norberg, admitted was a river boat coming upstream, he would be charged with knowledge of the fact that she would be over on the east side of the stream because that would be in accordance with the custom, and he should govern himself accordingly.

Mr. Wood: On that point I will say, your Honor—had your Honor something else?

Mr. Young: Your Honor, earlier in the day, here, you asked me some inquiry about whether the last clear chance had application in the case. In this particular case, here, without conceding there was any question of our being at a place where we had no right to be—even assuming that we were in a place where we did not have a right to be—if, nevertheless, we were actually seen by the other vessel and they had opportunity to avoid a collision, it [619] would necessarily be their duty to do so.

The Court: Have you pleaded your alternative position?

Mr. Young: Yes, I think so, your Honor. Complete failure to give any heed to the several whistles of the Barry K for starboard passage, the danger signals, the crossing of our first starboard passing whistle, that the Pennsylvanian either saw or ought to have seen the position of the Barry K but failed to take proper steps to avoid a collision, she failed to change her course to port so as to avoid a collision after sighting the Barry K, she changed her course to starboard and continued through to the moment of the collision—that is precisely the testimony of Captain Reed, which was corroborated by the captain of the tug Cruiser. She failed while yet a safe distance from the Barry K to slow down. She continued at an immoderate and unreasonable speed toward the Barry K. At all

times after the two vessels sighted each other and up to the moment of the actual collision, there was adequate space in the ship's channel to the west of the Barry K for the passage of the Pennsylvanian and no available space to the east of the Barry K for such passage, and the Pennsylvanian nevertheless failed to take advantage of such situation. She took no timely steps to avoid the collision.

The Court: No reference to custom, there.

Mr. Young: Oh, the custom is prior to this, your Honor. We have already stated and set out at some length the existence of the custom in a prior article. Article VI: "At said time and [620] during all years preceding, while river boats had been operating upon said river, it was unsafe and impracticable for river tugs such as the 'Barry K', particularly with barges in tow, to proceed upstream at said place on the west side of the river. Said 'Barry K' and tow was then proceeding up the east side of said river in accord with safety requirements and with the uniform practice of river boats with barges, which practice had existed for more than forty years prior thereto. Said practice and the basis therefor was well known to all Willamette River pilots." It used the word "practice" instead of "custom" is all.

The Court: You have a ground of negligence there, that the Pennsylvanian failed to change her course to port?

Mr. Young: Yes, that is right.

The Court: It was testified to before me in the

Constance Chandler case that a steamer would not answer to her rudder in making a change of course for two or three ship lengths.

Mr. Young: Well, we have not completed the testimony in this case, your Honor. That is one point on which there is going to be some further testimony, so far as the Libelant is concerned.

The Court: Normally part of your case in chief, is it not?

Mr. Young: No, I think the pilot made some comment to the effect that with the Pennsylvanian having turned to the right he could not get it back again on a course over to the left within the distance that was then available. I think we have a right to meet that testimony? [621]

The Court: Normally, that being one of your grounds of negligence, it would be part of your case in chief.

Mr. Young: Well, if the Court please, the testimony on our part shows that the first whistle which was given by the Barry K was a starboard passing whistle and that right after that the Pennsylvanian, instead of complying with the starboard passing whistle, blew a port passing whistle and itself proceeded over toward the right-side of the stream. In other words, that is the starting place.

The Court: And you charge that she should have turned to the left?

Mr. Young: Why, she should have turned to the left at this time. It is all a question of point of time when she was doing her turning.

The Court: But you have no testimony in here as to what movement she could have made to the left.

Mr. Young: As to what maneuver she could have made?

The Court: Yes.

Mr. Young: Well, if she did make a maneuver to the right, she could have made a maneuver to the left instead, in response to our signal. I do not think it would take expert testimony on that point. At the time that signal was blown, they were a mile apart, practically. The only controversy that has arisen, when they got much closer together than our testimony indicates then there was opportunity left for the Pennsylvanian to swing around to the left instead of continuing on to the right.

The Court: Suppose I thought that nearly everybody here, nearly [622] all of the principal witnesses were telling the truth, or at least were trying to, would not that narrow the controversy pretty closely, then?

Mr. Young: All of the principal witnesses were telling the truth?

The Court: Yes. For instance, that I thought that Captain Reed was telling the truth when he said he blew two whistles.

Mr. Young: Yes.

The Court: And that I thought all three of the Pennsylvanian officers were telling the truth when they said they heard only one.

Mr. Young: That is very easily answered, your

Honor, very easily answered. The point is that a person who says that he did not hear something, that testimony never carries the weight of the testimony of a man who says "I was there and I heard it." In other words, you have a case of negative testimony against positive, and both sides may be honest.

The Court: If you are a trial lawyer it will always come out. That is what I call legalistic reasons.

Mr. Young: Your Honor might call it legalistic, but, as a matter of fact, the Supreme Court of Oregon in a railroad case has very recently dealt at great length on that same subject.

The Court: Fortunately, I am not bound by that.

Mr. Young: That is true. I simply cite that as very substantial authority for the contention that I am making.

The Court: Is there any testimony in here about the depth of the water where the collision occurred? I do not suppose there was [623] opportunity to take any soundings at a time like that, nor did anybody.

Mr. Young: The testimony is that it is outside of the 35-foot channel.

The Court: Well, in their judgment.

Mr. Young: It was approximately 200 feet from the east shore, and there is testimony that the 35-foot channel starts about 400 feet out from the east

shore, and then, generally, that the water shallows up until you get to the shore.

The Court: What is your view about what the case shows as to depth of water where the accident occurred, as far as it has gone, Mr. Wood?

Mr. Wood: Mine?

The Court: Yes.

Mr. Wood: Why, I think it is marked on the chart. It speaks for itself. Captain Reed, himself, puts it on the edge of the 35-foot channel. If anything, it is a little bit inside the 35-foot channel.

Mr. Young: Well, if the Court please, Captain Reed put a red cross mark right at the point which is alongside of number 27. It is right on the edge of where the dividing line between the 30-foot channel and the shallow water is, and no human being could put the exact number of inches or feet within the place where this collision occurred.

The Court: That is what I think about all of the marks on that map. [624]

Mr. Young: Certainly. All of them are relative, of course.

The Court: Very relative. They are almost in the relations class. So there is no testimony in here as to what the depth of the water is. Nobody took the depth of the water, did they?

Mr. Wood: Nobody took soundings.

Mr. Young: Nobody took a sounding at the place, if that is what your Honor means.

The Court: That is what I mean. What else

could I mean? Are you going to bring the Inspectors here, or any of them here, as expert witnesses on practicability and safety?

Mr. Wood: No, I am only going to bring one of the Inspectors here in support of the allegation in my cross libel and answer that previous to this time they had already condemned towboats for coming up on the east side bank and that was a ruling that all pilots are bound to take cognizance of. I am going to bring a man to testify to that fact.

The Court: One on the Inspectors?

Mr. Wood: Yes, your Honor.

The Court: In effect, you are going to offer him as an expert witness?

Mr. Wood: I merely offer him to testify to the fact of the ruling that his office made.

The Court: But, in effect, he would not have made that ruling if, in his expert opinion, he had not felt that it was safe and practicable to operate port to port. So in effect you are offering [625] him as an expert witness to that effect. What is your position on that, Mr. Young?

Mr. Young: As to that, your Honor, when I read the cross libel of the Respondents in this case, I immediately communicated with the office of the Inspectors and was informed by Mr. Hill that he would check his records to see if there was any such case. He did so and he said he was unable to find any record of such ruling. I do not know what counsel will produce.

The Court: He is going to tell you now.

Mr. Wood: It is the case of two small towboats, each with tow, and one was the Modoc and the other was the Tidepoint, and I think it was the Modoc that was coming up and blew for a starboard passage, which the other vessel did not hear and therefore did not answer, and a collision occurred, and the Inspectors held the Modoc wrong for coming up on the wrong-hand side.

The Court: How long ago?

Mr. Wood: I think it was in '38, I believe it was. As a matter of fact, the Inspectors' opinion—there has already been evidence of their decision in this case, which has been offered in evidence.

Mr. Young: Well, if the Court please, the courts have expressly held that is not under any circumstance binding upon this court.

The Court: I have not held anything else.

Mr. Young: It is not bind——

The Court: None of this expert testimony is binding.

Mr. Young: I mean the question of a ruling of the Inspector [626] in some prior case is not in any event binding upon this court, because even Inspectors might be wrong. I want to see that decision, however.

The Court: There is no reason why the Inspectors cannot offer themselves here or be called here as expert witnesses.

Mr. Young: No.

The Court: And the practical difficulty you pre-

sent me with, Mr. Young, if Mr. Wood carries out his declared intentions, here, is that you are asking me on a highly controversial technical question involving safety to lives and property to take a position adverse to the executive and disciplinary officers of the Government.

Mr. Young: That is exactly your prerogative and that is precisely your duty, your Honor. If you believe he is wrong it is your duty to say so and I will at the proper time produce authority to that effect.

The Court: Well, I do not have any doubt as to that, that I could hold here that the President was wrong in declaring war, if that should come about, but I certainly would not do it, and I just restate to you my feeling about a question of this kind where life and property is so seriously involved, when you ask me to hold here on the basic question of practicability and safety contrary to the opinions and rulings of the executive and disciplinary part of the Government you are asking me to do a pretty serious thing.

Mr. Young: That is the duty of the Court, nevertheless, your [627] Honor, and I might call this to your attention in addition. Your Honor asked Mr. Wood a question one day which I think had some considerable significance. You asked him whether or not the Inspector had the power to punish anyone for violating the Pilot Rules even though there were no actual injury to anyone, and counsel's answer to that was "Yes." Now, the interesting cir-

cumstance is that there is evidence in this case that this custom to which we have referred has existed for the last 45 years. If you were going to punish everyone who had complied with this custom during the last 45 years, you would have all the pilots in the river in jail and they would have been there an indefinite length of time, and yet the most that counsel has even claimed for it in this case is that he found some one decision in 1938 where there was a holding that they were not to pass port to port. By the way, was that at Post Office Bar?

Mr. Wood: Yes.

Mr. Young: I want to see that decision. The Inspector informed me he had no such decision.

The Court: We will adjourn until 8 o'clock tomorrow morning.

(Thereupon, at 12:50 o'clock P. M., Court was adjourned until tomorrow, Tuesday, July 22, 1941, at 8 o'clock A. M.) [628]

Tuesday, July 22, 1941, at 8 o'clock A.M., pursuant to adjournment, the following further proceedings were had:

The Court: Mr. Maxwell and Mr. Wood, Jr., I assume that you are the lawyers on each side, anyhow the younger lawyers. There is a late article in 53 Harvard Law Review—that is June, 1940,—at page 1239 and page 1251, dealing with last clear chance in admiralty in relation to the doctrine of

comparative negligence. It is a rather interesting discussion.

Mr. Young: If the Court please, yesterday your Honor was inquiring of me with respect to our theory on the matter of custom. I wanted this morning to amplify one of the answers which I made. It is our position that with respect to whether or not it is was either safe or practicable for river boats to use the west side of the river that depends not necessarily upon conditions that may exist at any particular moment of time, but, rather, upon conditions which are changing from time to time and over long periods; that is to say, conditions with respect to the matter of the direction of the wind, its violence and velocity, the amount of current in the stream, stormy weather, day, night, the number of vessels which may be present or about Post Office Bar at the time that any particular river boat or tug is about to pass, and so forth.

Mr. Wood: You mean depends on the circumstances at the time of the passage?

Mr. Young: No, I am stating exactly the opposite, that it does [629] not necessarily depend upon that. Conditions at the time of the passage may be peculiarly dangerous at that particular point of time, but the custom upon which we rely and which is built up upon factors of safety and practicality is based upon these changing conditions over periods of time extending back as far as 40 to 45 years ago. Now, in view of the circumstance that the amount of danger which might exist to any particular river

boat with its tow in passing Post Office Bar might vary from time to time. In the interest of uniformity the custom has grown up toward the end that there will not be chaos in the matter as to which side of the river the river boats may be expected to be upon. In other words, the long series of circumstances based upon factors of safety and of practicality have produced this uniformity in the practice to which I refer.

Now, another point, your Honor. Yesterday upon the witness stand Captain Hosford testified to an alleged change in the practice by the Western Transportation Company boats since the time of the Pennsylvanian accident, and in cross examining him I was able only to ascertain the names of certain boats which he claimed were involved, namely, the Barry K., the Claire, and the Patricia. Since yesterday I have been checking up upon that matter, and in view of Captain Hosford's indefiniteness as to the particular time and place when he claims that these boats were using the west side of the river instead of the east side it will become necessary for us to call in all of the pilots and all of the Masters on those [630] three boats. At my present stage of investigation it appears that there will be about nine involved, and to bring them in here is rather crippling to the Company, but nevertheless if they can all be brought at about the same time it would be a matter of great convenience. I should like, therefore, to inquire at this time as to whether opposing counsel will expect to consume at least the balance of

today toward the end that I might perhaps assume that tomorrow morning would be the time to bring those witnesses in. I cannot bring them on very short notice.

Mr. Wood: I doubt, your Honor, whether we will consume the rest of the morning, because there is one witness of mine that I have not got and I do not know whether I can lay my hands on him or not, but of course if we do not consume the rest of the day I should not object to an adjournment until tomorrow morning and let him bring his men in.

Mr. Young: As a matter of fact, your Honor, it would almost necessitate that I plan on tomorrow morning, because so many men cannot be brought in just a few minutes of time. I might say that their testimony in each instance will be short, however, so that it will not consume a great deal of the Court's time.

The Court: You have other rebuttal testimony?

Mr. Young: Well, I have some, yes, your Honor. I had understood from the way counsel spoke yesterday that he was going to consume this morning, however, and that I would not probably reach rebuttal before tomorrow morning. [631]

The Court: You plan to bring your people in and complete your testimony tomorrow morning. I hope also the arguments tomorrow morning.

Mr. Young: Very well.

The Court: Does anyone have here that maritime case about the admissibility of the report of Inspectors, or can I send to the library and get it?

Mr. Erskine B. Wood: I believe we have cases here.

Mr. Maxwell: That has a Federal citation.

The Court: I do not want you to take a lot of time. Maybe they have the Federal citation.

Mr. Maxwell: 60 Federal 2d 543.

Mr. Young: On that same subject, your Honor, I might at this time refer you to the case of Steamboat Charles Moran, 115 U. S. page 78, '29 law edition 516.

The Court: Any others besides 115 U. S.?

Mr. Young: That is the only United States Supreme Court case. But there is another one which I have here: Marcus Fegan against Lykes Brothers Steamship Company, 1940 A. M. C. 993.

The Court: We do not have A. M. C. I wish you would cite us Federal.

Mr. Young: Well, this case, your Honor, is not in the Federal reports. It is a Louisiana Court of Appeals.

The Court: Does the Multnomah Law Library have the A. M. C.?

Mr. Young: We can bring it over from the office, your Honor. [632]

The Court: I want it this morning, so I will send Mr. Bragg over. 1940 A. M. C.?

Mr. Young: 1940 A. M. C. 993.

The Court: That is probably in the advance sheets yet.

Mr. Young: Yes, your Honor. If the Court please, may I make one further suggestion? Your

Honor has stated that you would like to have the arguments concluded tomorrow. It has occurred to me that in view of the fact that a number of legal questions have been raised and the fact that the testimony is rather long and involved that it might be more helpful to your Honor if we immediately filed briefs and then present the oral argument as soon as the briefs are before your Honor.

The Court: Mr. Wood said it was his custom and his preference to argue the facts and perhaps the law also immediately after the case, so that——

Mr. Young: It was my suggestion to do the other way. I am afraid your Honor will have to settle that way.

Mr. Wood: I would rather do it that way. I think we should talk it over while it is fresh in our minds.

Mr. Young: I will be governed, of course, by whatever your Honor decides.

The Court: Be prepared to argue.

Mr. Young: I should like to call Mr. Hosford for one question. [633]

L. O. HOSFORD

resumed the stand as a witness in behalf of the Respondents and further testified as follows:

Further Cross Examination

By Mr. Young:

Q. You testified yesterday that in the year 1927,

(Testimony of L. O. Hosford.)

I believe, you worked a couple of months for the Western Transportation Company.

A. Yes, sir.

Q. And what boats were you operating at that time? A. I was on the Annie Cummings.

Q. That was a stern-wheel river boat?

A. Yes, sir.

Q. Is that the only boat that you were piloting for the Western Transportation at that time?

A. At that time, I believe. I was on the Burton another time, but I don't believe I was at that special time.

Q. Was your work that of a pilot?

A. Pilot, yes.

Q. And at that particular time you had occasion to go past Post Office Bar? A. Yes.

Q. Which side of the stream did you use?

A. I think I used the east channel altogether.

Q. You used the east channel altogether?

A. Yes.

Q. And did you use the east channel altogether irrespective of [634] whether you were pushing barges or pulling log rafts?

A. I think so, yes. I don't think I used the west channel at all.

Q. And in using the east channel you used it going both directions—that is, either upstream or downstream? A. Yes.

Mr. Young: That was all.

(Testimony of L. O. Hosford.)

Redirect Examination

By Mr. Wood:

Q. Was it more convenient for you to do it that way?

A. Yes, it is more convenient by getting out of the channel on that side; you have more room.

Q. Slacker water, was it not?

A. I don't recall, Mr. Wood, the condition of the river at that time. It was in the late summer and fall. I don't think if it were looked up there——

Q. It would be a shorter distance for you?

A. Yes, it is shorter.

Q. You were cutting corners, going that way, were you not? A. Yes.

Q. Did the Company have a marine superintendent? Did the Western Transportation Company at that time have any general boss over you?

A. Yes. Mr. Confer.

Q. I was wondering whether they had given any general instructions to the pilots who were working for them to favor the slacker, shoaler water, take the shorter cuts, and take advantages of that kind.

[635]

A. I never heard of any. It is generally left to the Master in the discretion of the crew of the vessel.

Mr. Young: Yes.

Is that all?

(Testimony of L. O. Hosford.)

Recross Examination

By Mr. Young:

Q. Well, then Mr. Hosford, in using the east side of the river you were doing so under your own discretion at that time. Is that right?

A. Yes.

Mr. Young: That is all.

The Court: All right, Captain. Step down.

Mr. Wood: No, I have another question on another subject.

Redirect Examination

By Mr. Wood:

Q. Captain Hosford, earlier in this case mention was made by opposing counsel of the collision between the Welsh Prince and the Iowan. Do you recall that?

A. Yes, sir.

Q. Was that collision one where one steamer blew two blasts and attempted to pass to the left in a narrow channel?

Mr. Young: If the Court please, I object to that question unless this witness was present and observed the accident.

The Court: I guess that will come out.

Mr. Young: Pardon? [636]

Mr. Wood: Well, no. They brought it up themselves. This case, I should like——

Mr. Young: Well, if the Court please, the only occasion——

The Court: What do you know about it, Captain?

A. Only what I have read and heard?

(Testimony of L. O. Hosford.)

The Court: He is not qualified.

Mr. Wood: It is common knowledge on the river.

Mr. Young: Common knowledge——

A. I wasn't present.

The Court: I ruled, Mr. Young.

Mr. Wood: Q. How about the case of the Feltra and the Luckenbach not so many years ago? Do you know about that?

Mr. Young: The same objection.

The Court: The same ruling.

Mr. Wood: Q. You do know that both the Welsh Prince and the Feltra were sunk, do you not? A. Yes, sir.

Mr. Young: I move to strike out the witness's answer, your Honor.

The Court: Motion denied.

A. I saw them.

Mr. Wood: Q. About how long ago was it that the United States Engineers widened the channel at Post Office Bar from its former width of, I think, 500 feet to its present width of between seven and eight hundred feet?

A. They completed it two years ago this fall.

Mr. Wood: That is all. [637]

Recross Examination

By Mr. Young:

Q. Is it not a fact that at the present time it is only the 35-foot channel at that point that is being maintained by the United States Engineers?

(Testimony of L. O. Hosford.)

A. I couldn't answer that, Mr. Young. I don't know.

Mr. Young: That is all.

(Witness excused.)

Mr. Wood: I believe you reserved the right to put Captain Norberg back on the stand. Do you wish to do that now?

Mr. Young: I do not recall as to Captain Norberg. It was Captain Hosford.

Mr. Wood: All right. I will recall Captain Norberg.

JOHN NORBERG

resumed the stand as a witness in behalf of the Respondents and further testified as follows:

Further Direct Examination

By Mr. Wood: [638]

Q. Captain Norberg, in my going over the transcript of your testimony the other day, I noticed you testified that at the time you received the first danger signal from the Barry "K", you put your engines at half speed and stopped and I want to ask you if that testimony is correct?

A. No. I had the engines stopped before that, when she showed the green light and when I saw the danger signal——

Q. What is the correct testimony; what are the facts about that? When you saw the green light of

(Testimony of John Norberg.)

the Barry "K" first, what did you do with your engines at that time?

A. Half speed and stop.

Q. That is when you saw the green light first?

A. Yes.

Q. Then when you received the first danger signal from the Barry "K", what did you do with your engines?

A. Full astern.

Q. Did you make an official report to the United States Inspectors along with Captain Vaux about this collision?

A. Yes, sir.

Q. And since you gave your previous testimony have you refreshed your memory by that report?

A. I did.

Q. And does that report state the facts as you have now stated them?

A. Yes. [639]

Q. Have you got that report with you?

A. I have.

Q. I will ask you to produce it.

A. I have got it in my coat pocket there.

The Court: Mr. Wood, Jr., maybe you will want to look at this U. S.—the question may come up during the morning.

Mr. Wood: Q. Is that the report?

A. Yes, this is.

Q. Is that the copy of the one that you sent in to the Inspectors?

A. Yes.

Q. You signed it?

A. Yes.

Mr. Wood: This, your Honor, is a copy of the same report which was offered yesterday and on

(Testimony of John Norberg.)

which your Honor reserved ruling in connection with Captain Vaux' testimony. This was the one they both signed. In fact, their signatures are on this, and in view of the witness's present testimony, I think I will offer it.

Mr. Young: May I see it, if you please? This is the one I was reading yesterday? That is objected to upon the ground that it is a self-serving document, that it is hearsay, that it is not admissible in favor of the party offering it, in this instance the respondent, American-Hawaiian.

The Court: I will reserve ruling until the argument. [640]

(The document, so offered, was marked Respondents' Exhibit 12 for identification.)

(Testimony of John Norberg.)

RESPONDENTS' EXHIBIT No. 12 FOR
IDENTIFICATION

AMERICAN-HAWAIIAN STEAMSHIP
COMPANY

Operating Department
Portland Trust & Saving Bank
Box 1982

Cable and Radio

Address

Amhawaii

M.S.

S.S. Pennsylvanian Voy. 87 W.B.

Written at Portland, Oregon

Date February 1, 1941

(In Reply to Operating

Dept. Letter, File No.)

Subject Collision

Bureau of Marine Inspection & Navigation

Captain Arthur Joachims, Local Inspector,

Portland, Oregon.

Dear Sir:

I regret to report a collision between Western Transportation Barge #22, being towed by tugboat 'Barry K' at 12:55 A.M. this day Feb. 1, 1941 at Post Office Lower Light in the Willamette River. The Pennsylvanian was considerably damaged about the bows and I understand the barge and her cargo is also damaged. There were no personal in-

(Testimony of John Norberg.)

juries and both my vessel and the barge were able to reach this port and are now here.

The Pennsylvanian Capt. Earle B. Vaux, Master and Pilot John Norberg left Pier 'A' Portland at 12:03 A.M. this day bound for Astoria. Weather overcast—visibility good—calm and smooth, tide ebbing. Vessel proceeded down river passing through R.R. Bridge at slow speed. At 12:39 engine at half speed passing under St. Johns Bridge. At 12:50 A.M. Full ahead sighted a towboat approximately half a point on port bow showing regulation towing lights (white) and red side light with brilliant deck lights. About a minute later the towboat blew one blast on her whistle, which was understood by Pilot Norberg and by me to be a passing signal and that he (the towboat) was passing 'port to port'. This vessel answered with one blast, and continued down stream well on her right-hand side of the channel. As we approached closer, the 'Barry K', which had up to that time been showing her red light, showed her green side light, and shut out the red. She was still far enough away, however, to resume the port to port passage. Nevertheless, as soon as we saw her green light, we slowed to half speed and stopped, the stop order following immediately on the half speed. The bridge bell-book entry for this is at 12:54 A.M., which, however, is only to the nearest minute. Shortly after we had stopped our engines, the 'Barry K' sounded several short and rapid blasts, understood by us to be the danger signal, and we

(Testimony of John Norberg.)

immediately put our engines full astern and wheel hard right, and Pilot Norberg sounded three short blasts of the steam whistle to designate engine running full astern. This is recorded in our bell-book at 12.55 A.M., which, again, is only to the nearest minute. After a short period going with engines full astern and rudder hard right, we collided with Barge #22 of the Western Transportation Company. Though the collision is recorded in the bridge bell-book, to the nearest minute, at 12:55, the interval between reversing full speed astern, rudder hard right, and the collision was considerable.

Called through megaphone to tugboat asking if he was all right or needed assistance. He answered he had a broken oil-line. At about 1.10 A.M. tugboat Cruiser bound up river went to the Barry K and then came alongside to pick up the two barges that were drifting. Asked Cruiser if he needed any assistance and if anyone aboard barges, to which he replied, 'No'.

Bilges and fore peak tank showed no change and at 1.23 A.M. proceeded toward Astoria. At 1.52 A.M. repeated soundings showed that vessel was making water in the fore peak tank (used for fresh water). Stop-turned around and proceeded to return to Portland and began pumping from fore peak. Vessel docked Portland 4.10 A.M. this day.

In my own statement and firm belief the towboat Barry K and her tow of two barges failed to keep

(Testimony of John Norberg.)

her right side of channel after blowing one blast;
also tow improperly and inadequately lighted.

Respectfully submitted,

E. B. VAUX

Master

S.S. Pennsylvanian

I concur in the foregoing statement.

JOHN NORBERG

Pilot.

[Endorsed]: Filed Jul. 23, 1941.

Mr. Young: If your Honor will pardon us just a minute, I want to check this witness's testimony in the transcript.

The Court: You will need a little more time than that, I judge.

Mr. Young: If the Court please——

The Court: What does the bell book show as to the time when the engines were put at half speed and stopped?

Mr. Wood: It is 12:54, half speed, stop.

The Court: Q. So, Captain, the accident occurred to the nearest minute at 12:55?

A. Yes, sir.

Q. And at 12:54 to the nearest minute, which would mean making all allowances, not more than two minutes—or less than two minutes before was when you first saw the green light?

A. Just about. Less than two minutes.

(Testimony of John Norberg.)

Mr. Wood: You understand, your Honor, that in these bell books these "stops" and "go ahead" are in symbols; they are not written out; they have a quick symbol?

The Court: I am glad to have you tell me what they mean.

Mr. Young: That is why I went over those yesterday with the other witness, your Honor.

The Court: We are beginning to get down to cases, now, gentlemen. The pilot first apparently felt that the situation [641] called for action on his part at 12:54, to the nearest minute, when he saw the red light change to the green.

Mr. Wood: That is when it was "half speed" and "stop."

The Court: Half speed and stop; so that the events thereafter up to and including the collision transpired within less than two minutes.

Mr. Wood: That is right.

Cross Examination

By Mr. Young:

Q. Captain, does this bell book show or say anything with reference to your seeing the green light or red light, either one?

A. No, it doesn't show here.

Q. Well, all you see from the bell book is, first of all you see 12:50. What time is that; what happened then? A. That is full speed.

Q. What is that? A. Full speed.

Q. That was full speed. Now, at 12:54, what next happened? A. Half speed, stop.

(Testimony of John Norberg.)

Q. Half speed and stop? A. Yes.

Q. And those came close together?

A. One bell after the other.

Q. One right after the other. The reason why you did any particular thing at that time does not appear in the bell book, [642] does it?

A. No. It was just a precaution to stop at that time, saw a green light; no apparent danger at that time.

Redirect Examination

By Mr. Wood:

Q. You say there was no danger at that time?

A. At that time there was no danger.

Q. But you stopped out of precaution?

A. Yes.

Mr. Young: That is all.

Mr. Wood: That is all.

(Witness excused.) [643]

The Court: Do you reserve the right to recall the Captain after you have examined the transcript?

Mr. Young: If your Honor please.

Mr. Wood: If your Honor please, I asked Mr. Wells, the United States Weather Bureau man, to come and testify this morning about the wind velocity on the night of this collision, and he informed me that he had a regular Government form of certificate which they always used, and he supplied me with this and offered to come if counsel and the Court required it, but there is the certificate which I offer in evidence.

Mr. Young: This is objected to, your Honor, upon the ground that it purports to show the wind velocity at Portland, Oregon, and before it would be admissible with respect to the condition which existed at Post Office Bar it would have to appear that this is accurate as to Post Office Bar. The Court will take judicial notice of the fact, however, that a number of miles intervene between the place where the accident happened and the place where this weather record is kept by the United States Bureau. I assume it is kept at the Customs House in the City of Portland.

The Court: Which is about how many miles from Post Office Bar? Ten to fifteen?

Mr. Young: I should imagine ten miles, at least.

The Court: It is admitted.

What does it show?

Mr. Wood: It shows the wind velocity was a breeze from the East of seven miles an hour. [644]

(The certificate, so offered, was received in evidence and marked Respondents' Exhibit 13.)

RESPONDENTS' EXHIBIT No. 13

UNITED STATES OF AMERICA

United States Department of Agriculture
Weather Bureau

Station Portland, Oregon Date July 21, 1941

As the custodian of the records of the U. S. Weather Bureau, filed at Portland, Oregon, I here-

by certify that it appears from such records that at Portland, Oregon, the wind movement from 12:00 midnight to 1:00 a.m., February 1, 1941, was at the rate of 7 miles per hour from the east.

EDWARD L. WELLS

Meteorologist in Charge.

[Endorsed]: Filed Jul. 23, 1941.

JAMES A. HAZELWOOD

produced as a witness in behalf of the Respondents, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wood:

Q. Captain Hazelwood, you are in the employ of the American-Hawaiian Steamship Company, are you not?

A. Yes, sir; 25 years.

Q. What is your present employment?

A. I am Superintendent of Stevedores and Operation on the Columbia River.

Q. And have you been Master of ships?

A. Twelve years with American-Hawaiian.

Q. Actually operating as a Master?

A. Yes, sir.

Q. In what trades?

A. Intercoastal trade between Puget Sound and as far north as Boston on the East Coast.

Q. Do you have any pilot licenses, did you say?

A. Yes, sir. I have a first-class pilot from New

(Testimony of James A. Hazelwood.)

York Harbor, San Francisco Harbor, sea and return, and Los Angeles Harbor to Wilmington. [645]

Q. Have you navigated the Columbia River?

A. Yes, sir; as Master.

Q. How long ago?

A. From 1926 to October, 1935.

Q. When I said the Columbia River, I included the Willamette.

A. Yes, sir; the Columbia and Willamette rivers.

Q. Are you familiar with the Post Office Bar——

A. Yes.

Q. ——part of the river? A. Yes, sir.

Q. What do you say as to the practicability and safety of vessels to pass there, vessels and towboats to pass there port to port in accordance with Article 25 of the rules?

A. Well, in the channel, the 30-foot channel is 800 feet and the 35 channel is 600 feet. It is certainly room enough for vessels to pass there port to port without any danger.

Q. When you say “vessels,” are you confining that to ocean steamers, or all kinds of vessels?

A. No; any class of vessels.

Q. Including steamships and towboats with tows? A. Yes, sir.

Q. Is there anything at all about the curvature of that channel or the wind conditions and so on, as they have been described to you in court, that would make the port to port passage difficult in that channel? [646]

(Testimony of James A. Hazelwood.)

A. No, sir; not that I can see. A channel that wide with the vessels making any headway through the water at all, they certainly should be able to keep clear of one another with a port to port passing, there.

Q. What would be the difficulty or impropriety of an ocean steamer going down there at night attempting to make a starboard to starboard passage?

A. Well, certainly in case of an ocean-going steamer down seeing a red light he would have no reason to believe that the tugboat and barges were anywhere but on their own starboard side of the channel and were coming across the channel, and showing him a green light he would have no reason to believe that such a thing would occur and an ocean-going steamer down there passing starboard to starboard, if he did get in close, he would be putting himself in the same position on the wrong side of the channel that the tugs claim is the reason they don't use the starboard side of the channel coming up. In case that he had to back for any reason, in case of close quarters and he had to back his ship, his stern would back right into that, if he was close enough, back into these old piling and damage his rudder and his propeller, and he just couldn't handle his ship any more.

Q. What would your bow do?

A. His bow would swing right across. If he had to back long enough he would head right across the channel with his bow, backing to the right.[647]

(Testimony of James A. Hazelwood.)

Q. What tendency would that have to increase the risk of collision?

A. He would get crosswise of the channel there and certainly in case of meeting another ship he would stand a very good chance of being in a collision, or a towboat.

Q. What effect would a downstream current have?

A. Well, a ship does not handle as well going with the current as she does against it, because in navigating in the river, in rivers, in case of fog, if you anchor, lots of times if the fog clears a little bit you will keep your anchor down until the tide changes and you have head current, and then you get under way and proceed slowly, because you always have control of the ship in case you have to stop. You don't have to do a lot of backing and get the way off your ship in case of meeting another vessel. In this particular place, if a ship did happen to be over on the west bank going down the stream with a fair current, and for any reason he had to anchor his vessel, his stern would swing around in that curve and he would have, instead of having his bow on the beach where he would over the other side, might go ashore, he would have his stern down on those piles again, and he would also take a chance of damaging the propeller and the rudder of the ship.

Q. You have heard this testimony, have you, about the practice on the bridge of a ship of the

(Testimony of James A. Hazelwood.)

navigating officers confirming to each other the whistles that are heard? Have you heard that testimony? A. Yes, I have, sir.

Q. Have you any comment to make on that? [648]

A. Mr. Wood, from my experience, that comes just as natural to you as someone speaking to you, to ask you "Yes" or "No," "I beg your pardon; I don't understand," men on the bridge of a ship hear a whistle,—it is most always one or two blasts, whatever that whistle is, repeat it, so it is just a practice and something that I have always heard myself on the bridge of a ship.

Mr. Wood: You may cross examine.

Cross Examination

By Mr. Young:

Q. Captain Hazelwood, to what extent have you had occasion to operate personally towboats on the Willamette River? A. None at all, sir.

Q. You have never been the pilot of a river steamer? A. No, sir.

Q. Stern-wheel or otherwise? A. No, sir.

Q. You have never operated a small tugboat at all?

A. No, sir. I have operated small vessels but not on the Willamette River.

Q. What vessels, if at all, have you actually operated on the Willamette River?

A. Well, I have never piloted the vessels on the Columbia River. I have been a Master of a ship

(Testimony of James A. Hazelwood.)

since 1926, navigating the Columbia River. About five times a year—that would be five trips in and out in that time. [649]

Q. You, however, have not actually piloted any ships then of any sort whatever in the Willamette River. Is that right?

A. No, sir; I have not.

Q. Have you piloted any ships at all in the Columbia River? A. No, sir.

Q. Then your knowledge of the situation down around Post Office Bar is just based upon looking at the place. Is that right?

A. Well, Mr.—I have been in rivers more difficult to operate than the Columbia River, and in any river, if I was going to use the wrong side of the channel I would use the same precaution that I would if I was going to drive up to my house on the wrong side of the street. I would make sure no one else was on that street when I did so.

Q. Now, Captain, how many ships does the American-Hawaiian operate in and out of Portland?

A. At the present time only twelve, but at the time that this accident occurred they operated twenty-two ships.

Q. Twenty-two ships? A. Yes, sir.

Q. Those, of course, are all ocean-going vessels?

A. Yes, sir.

Q. And how do the drafts of those vessels vary? Let us assume they are all loaded to capacity. What would the drafts of those ships vary from to what?

(Testimony of James A. Hazelwood.)

A. Well, from about 26 feet to 32 feet. [650]

Q. 26 to 32? A. Yes, sir.

Q. And then if they were partly loaded with cargo, or were travelling light, the draft would be less. Is that right? A. Yes, sir.

Q. In the case of your vessels which are loaded up to, say, 32 feet draft——

Mr. Wood: Pardon me. I think this will help you as well as me. Ask him, please, if those vessels customarily go out of here fully loaded. I do not think they do.

Mr. Young: I think, if the Court please, counsel may ask such questions as he wishes on examination. This is my cross examination.

Mr. Wood: If your Honor please, I presume what we are all after here is the truth and the facts. Now, if it is a fact, as I believe, that none of these vessels go out of here fully loaded, or hardly ever, why should not we know it now? He asked him to assume that they were all fully loaded, and what would they draw.

The Court: Go ahead, Mr. Young. I do not know what his point is at present.

(The last question was read by the reporter.)

Mr. Young: I will withdraw that question.

Q. Your counsel has made a statement, here, that your vessels do not operate in and out of this port loaded. What is the fact in that regard? [651]

A. That is a fact. They do not. It has been

(Testimony of James A. Hazelwood.)

about eight years since we had a vessel go out of here fully loaded.

Q. Well, in case you happen to get a cargo out of here you will load it fully, will you not?

A. We have to make several ports, you see, and our space is allotted so much to each port and this is the first port of loading, so therefore our vessels at the present time do not go out of here fully loaded.

Q. How nearly to being fully loaded do they come in and out of this port?

A. I think about 21 or 22 feet is as much draft as any of our ships have coming in and going out of here.

Q. There are, however, ships operated by other lines in and out of this port that move in and out fully loaded, do they not?

A. I understand so.

Q. Some of those ships will run as high as 30 or 32 feet in draft when loaded. Is not that true?

A. I understand that, sir.

Q. Now, in the case of your own ships, in going down past Post Office Bar, where do your ships travel with reference to the center of the channel?

A. Well, a vessel drawing nineteen feet of water certainly it's not necessary for him to keep in the 35-foot channel.

Q. Will you please answer my question? What is the practice of the vessels of your company with

(Testimony of James A. Hazelwood.)

respect to where they stay [652] relative to the center of the channel?

A. They stay in the part of the channel that there is enough water to float the vessel safely.

Q. Now, how near do they go to the center of the channel?

A. Not necessarily always in the center of the channel. They keep to the right-hand side—their own right-hand side—of the channel in navigating the channel.

Q. You say “Not necessarily.” You mean that they do use the center of the channel from time to time. Is not that true?

A. Well, if you stay on the ranges you are more or less in the center of the channel.

Q. Yes. A. Yes.

Q. As a matter of fact, if you are travelling on Post Office Range, you have to go through the center of the channel, do you not? A. Yes.

Q. That is right. And when you go off that range, you will have to be in the center of the channel for at least a short period of time, will you not? A. Yes.

Q. And Post Office Range is in close proximity to Post Office Bar, is it not?

A. Well, that is what they are called, Post Office Bar Ranges.

Q. In other words, a ship which is travelling along the line which is set by the United States

(Testimony of James A. Hazelwood.)

Engineers is necessarily [653] travelling toward the center of the channel, is it?

A. That is a fact, but it also don't necessarily mean that this vessel has to keep right on these ranges. When there is enough water on the starboard-hand side to do it, she can come off the ranges at different points, not necessarily staying right in the center of that channel. Those ranges are only there to line up the channel when you enter the channel, if you so see fit to use the—off the ranges with the ranges open to the left or to the right, that is entirely up to the Master of the ship.

Q. You are not, however, violating any navigation of those if you use the ranges, are you?

A. No, you are not.

Q. Suppose that an ocean-going ship is proceeding downstream in the center of the channel. Is it not a fact that there would be ample room for that ocean ship to pass a river boat starboard to starboard?

A. Yes.

Q. Do you know what the depth of the river is opposite Post Office Bar?

A. Yes.

Q. How does it vary?

A. Well, it varies from over on the east side to practically no water up on that shoal, across to the dike on the other side from 30 to 35 feet of water.

Q. And do you agree with the other witnesses in this case that [654] it is comparatively shoal

(Testimony of James A. Hazelwood.)

water out to about 400 feet from the east shore before you get to the 35-foot channel?

A. Yes.

Q. Now, from that 400-foot point on over to the east edge of the river, do you know to what extent the water shoals?

A. No, I don't know.

Q. Do you know how many feet of water there are, for example, in the last hundred feet up to the east bank?

A. No, I don't know that.

Q. You would not want any of your boats to be over there, would you?

A. Well, they have no business over there. If they did they would be out of the channel, and they are not supposed to navigate out of the channel.

Q. You were stating, however, that if your boat is drawing only 21 feet of water, that it can, with complete safety, travel in the 30-foot channel?

A. Well, certainly.

Q. As a matter of fact, the actual ship channel maintained by the Government is a 35-foot channel, is it not?

A. Well, I am not so sure of that. They certainly dug that 30-foot channel out there. That channel didn't just naturally get there alone. It was certainly dug out, and that channel was dug to that depth for that width so it would be safe for a vessel to navigate that channel. That was the idea.

(Testimony of James A. Hazelwood.)

Q. Pardon me? [655]

A. That was the idea that the engineers had in mind when they widened that channel to 800 feet, so as to make it a safe passage through those waters.

Q. When was it that they widened it?

A. I understand about two years ago. I know I saw the dredges working there at different times.

Q. Is the United States Government maintaining any of the channel except the 35-foot channel?

A. That I couldn't say.

Q. Now, Captain, you testified that it was just a matter of every-day conversation, as it were, for the navigating officer or the pilot on the bridge of one of your ships to say that he hears one blast or two blasts of a whistle of an approaching ship and then receive a confirmation from the other men on the bridge. Is that right?

A. Yes.

Q. Is that a practice which exists peculiarly on American-Hawaiian ships?

A. I don't think so.

Q. You don't think so?

A. I don't think so. It is a custom of the American-Hawaiian, but I think it is more or less a custom on any ship, that those orders are passed.

Q. Is that a custom which has been established by direction of any of the officials of your company? [656]

A. No.

Q. It is just a habit that the men have gotten into. Is that right?

(Testimony of James A. Hazelwood.)

A. It is a habit on the American-Hawaiian ships. The men that are Masters of those ships are men that have gone up there from sailor and quartermaster, and it is something handed down from generation to generation of American-Hawaiian ships.

Q. How many generations have American-Hawaiian ships been running in and out of this port?

A. They have been running only since the last World War, that the American-Hawaiian began running ships in the Columbia River.

Q. Is it not a fact, Captain, that the real purpose of this conversation which takes place between the pilot and other officers on the deck is to satisfy the pilot with the accuracy of his own observation in a case where he is in doubt?

A. No. No, that is not a fact. On shipboard there is always a rule that whenever an order is given it shall be repeated by the person that the order is given to, and also those things happen to—if a person repeats something, other people repeat those orders to be sure—it is a check, more or less.

Q. If the pilot calls out, "I hear one blast," that is not an order, is it?

A. No, that is not an order, but it means he hears one blast, and if there is any question that the others hear two blasts, then someone on the bridge will say, "I think you are mistaken. That is two blasts of the whistle. I think I heard two blasts."

(Testimony of James A. Hazelwood.)

Mr. Young: That is all. [657]

Mr. Wood: I want to ask a question, Captain Norberg.

The Court: Mr. Maxwell, will you phone down to your office and ask them to send up that 1940 A. M. C.? It is out of the library. It is being bound. Hand it to Mr. Maxwell.

Redirect Examination

By Mr. Wood:

Q. Captain Hazelwood, you have looked at this chart. You recognize it, do you not?

A. Yes, sir.

Q. You said that if a vessel came down on the range and into the center of the channel, there would be room for a starboard to starboard passage between an ocean steamer and a towboat?

A. Yes, sir. Well, he would have to stay on the range that much longer. He would have to get over on his——

Q. There would also be room for a port to port passage, would there not?

A. Certainly there would.

Q. Passing either side, as far as room goes?

A. Yes.

Q. In other words, there is plenty of room?

A. Plenty of room.

Q. Now, the obligation of a vessel, according to the law, is to stay on that side of the channel which lies on her starboard-hand. Is that right?

A. That is right. [658]

(Testimony of James A. Hazelwood.)

Q. And you said that the vessel, that the purpose of a range was largely to guide a man in entering——

A. That is right.

Q. ——a narrow or dredged channel.

A. That is right.

Q. Now, it does not mean, however, that he must keep those range lights directly in line?

A. Not at all.

Q. What does it mean?

A. Well, it means that he comes in that channel, and when he gets on those ranges he knows it is time he can turn into that channel, and he can stay on those ranges, but he can keep them open from either side. That is entirely up to him.

Q. In other words, when a man is staying on the range, he does not necessarily have to have the lights in line, does he?

A. Well, if these ranges was right, in parallel with the channel, and he was meeting another ship coming up, he would have to get off those ranges—one of those vessels would have to get off the ranges to make the passage.

Q. Exactly.

The Court: What is the next range below Post Office?

A. There are no more ranges in the Willamette River, I don't believe.

Mr. Wood: Q. In other words, a pilot coming down and staying on the right-hand side of the channel, he can have the range [659] lights open

(Testimony of James A. Hazelwood.)

on that side and still be guiding himself by the range, can he not?

A. Sure. In other words, if he is to the left, the ranges would open one way. If he went to the right, these lights—this time would be one on this side and the next time it would be the opposite direction.

Q. Now, if you look at this chart and look at the place where both pilots practically have marked the position of the Pennsylvanian at the first sight, if the Pennsylvanian was right on the range, there, he would still be on the right-hand side of the channel at that point, would he not?

A. He certainly would.

Q. And as he comes down here and begins to leave the range, where I am pointing, with the blue cross, he would be still further on the right-hand side of the channel?

A. Yes, sir.

Q. And he would be on the right-hand side of the channel all the way down, would he not?

A. He certainly would.

Q. That is proper navigation, is it not?

A. It certainly is.

Mr. Wood: That is all.

Recross Examination

By Mr. Young:

Q. Captain, a river boat can, with complete safety to itself, [660] travel up or down stream in the most easterly 400 feet of the river's width, can it not?

A. I don't know. I take for granted he can, but

(Testimony of James A. Hazelwood.)

he certainly should be out of the channel if he is going to do that.

Q. I said in the easterly 400 feet.

A. Yes.

Q. That puts it out of the 35-foot channel, does it?

A. But that is still not out of the channel if a ship is only drawing 19 feet of water.

Q. Do you understand me? That 400 feet is east of the 35-foot channel, is it not?

A. That is right.

Q. Now, a river boat can, with complete safety to itself, travel in that 400 feet of distance, can it not? A. Yes.

Q. On the other hand, the moment that one of your ocean-going vessels, whether it is an American-Hawaiian or any other ship drawing anywhere from 20 up to 32 feet of water, gets over within that 400 feet, it is encountering serious hazards to itself, is it not?

A. Yes, and I don't think any ship, because he wasn't drawing enough water, would deliberately run into another just to keep him on the side of the channel, to keep him off the east side of the channel.

Q. You do not agree that is what the American-Hawaiian Pennsylvanian did? [661]

A. I certainly do not. Because he was in 35 foot of water when the collision occurred.

Q. You observe this mark, do you not, this cross mark, which is right on the edge——

(Testimony of James A. Hazelwood.)

A. Yes.

Q. ———of the 35-foot—that cross mark is exactly alongside of the number 27, which is on the east side, and the number 37 on the west side. Do you agree with that? A. Yes.

Mr. Young: That is all.

Mr. Wood: That is all, Captain.

(Witness excused.)

Mr. Wood: We will call Captain Dyer.

HENRY C. DYER,

produced as a witness in behalf of the Respondents, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wood:

Q. Captain Dyer, what is your present residence and occupation?

A. I am at 2967 Northwest Raleigh, and I am port captain for the Pacific-Atlantic Steamship Company and the States Steamship Company and California-Eastern.

Q. And what has been your experience as a ship Master?

A. On actual ships about eight years, about eight years at sea [662] as Master.

Q. As Master. And prior to that time?

A. As chief officer and second officer and so on down. I have been at sea for about 26 years.

(Testimony of Henry C. Dyer.)

Q. What trades were you in or what steamships did you operate during that eight years you were Master?

A. Matson Navigation Company running in the northwestern run to the Hawaiian Islands and in the States Steamship Company to the Orient.

Q. When you were running the States Steamship Company to the Orient, what ship did you have?

A. The Iowan and the General Sherman. The General Sherman for the principal part of the time.

Q. You were not on the Iowan when she was wrecked?

A. No, sir.

Q. And all lives were lost?

A. All lives were lost.

Q. Now, in your capacity as Master of steamships on that Oriental run for the States Steamship Company, did you navigate the Columbia and Willamette rivers?

A. Yes, sir. On the General Sherman I made thirteen successive trips. On the Iowan I came in as Master.

Q. And as port superintendent for those companies, is it your duty in a general way to be familiar with the ship operations on the rivers, here? [663]

A. Yes, sir.

Q. Are you familiar with the channel at Post Office Bar in the Willamette River?

A. Yes, sir; fairly familiar.

(Testimony of Henry C. Dyer.)

Q. What is your expert opinion on whether or not it is safe and practicable there for a river steamboat with barges alongside and in front, in tow, to pass an ocean-going steamer there port to port in the nighttime, a calm night and visibility good? A. Well, I see no reason——

The Court: The wind ten to fifteen miles an hour, or do you want to include that?

Mr. Wood: Well, the wind ten to fifteen miles an hour according to some testimony, but seven miles an hour according to the Government records of Portland.

The Court: What wind do you want to put in your question?

Mr. Wood: I will put it the worst for my point of view. I will say with the wind ten to fifteen miles an hour from the East.

A. I don't see any reason why they shouldn't pass port to port, each with his own starboard-hand to the channel, the width of the channel there is there.

Q. You have never been a towboat man yourself, have you? A. No, sir.

Q. However, in the course of your long experience as a navigator, I assume in many instances you have witnessed towboats and observed them?

[664]

A. Yes, sir.

Q. And passed them, have you?

A. Yes, sir.

(Testimony of Henry C. Dyer.)

Q. You know how they handle in a general way?

A. In a general way; yes, sir.

Q. In fact, some of the harbors that you have entered like Hawaiian and San Francisco are full of towboats, are they not?

A. Oh, yes.

Q. There has been some implication here that a practice of officers on a bridge of a ship to confirm signals heard is more or less confined to American-Hawaiian steamships. I want to ask you whether you know of such a practice.

A. I don't think it is confined to the American-Hawaiian. I think that confirming whistle signals, confirming various navigational data is customary on any ship.

Mr. Wood: Yes. That is all.

You may cross examine.

Cross Examination

By Mr. Young:

Q. Captain Dyer, as I understand, you, yourself, have never operated a river steamer?

A. No, sir.

Q. You have never operated one of these stern-wheel boats down here in the river?

A. No, sir. [665]

Q. Have you ever operated a river tug of any kind?

A. No, sir.

Q. Your experience, then, in the actual handling of vessels has been confined to ocean-going ships?

A. Yes, sir.

(Testimony of Henry C. Dyer.)

Q. You have just seen the others on the river. Is that it?

A. Well, and been assisted by them.

Q. You have been what?

A. Assisted by them in docking and so forth.

Q. But you, personally, had nothing to do with the actual operation or piloting of any of those river boats? A. No, sir; that is very true.

Q. Now, how many times altogether in your life do you think you have been over Post Office Bar?

A. Oh, I would say forty.

Q. Forty? A. Yes.

Q. And that is spread out over what period of time? A. Roughly ten years.

Q. When were you last over Post Office Bar?

A. I believe last year I went over and relieved the Master of the ship going to Vancouver, something of that sort.

Q. At any times when you were piloting vessels past Post Office Bar, did you ever meet any tugs with tows?

A. I have never piloted vessels over—I mean I have been in the [666] capacity of Master, but I do not hold a pilot license on the Columbia River.

Q. You have never even piloted a vessel of any kind on the Willamette or Columbia rivers?

A. No.

Q. You acted solely as Master?

A. As Master.

Q. Do you remember whether or not when you

(Testimony of Henry C. Dyer.)

were on any vessels going Past Post Office Bar that you met any tugs with tows?

A. I don't remember any specific incident, no.

Q. Do you, personally, know what the depth of the water is at Post Office Bar?

A. Well, it is a 35-foot channel—the various depths, 36, I think, up to 38 in some places.

Q. And how wide is that 35-foot channel?

A. I believe in the neighborhood of 800 feet.

Q. 800? A. Yes.

Q. Are you not getting the 35-foot channel confused with the 30-foot channel? A. Possibly.

Q. In other words, the 35-foot channel may be narrower than the eight hundred feet?

A. Yes.

Q. Do you know where that channel is with reference to the west [667] side of the river at that point?

A. It is a little bit closer to the west side than the east side.

Q. In other words, the water shoals over on the east side, does it not?

A. Shoals to the east side, yes.

Q. On vessels of which you have been Master, going up and down the Willamette River, what has has been their draft?

A. Well, I have been with nothing deeper than 24-6, I would say; possibly 24-9.

Q. Is that light or loaded?

A. That would be loaded.

Q. Well, the vessels of the States Steamship

(Testimony of Henry C. Dyer.)

Company are smaller, are they not, than the American-Hawaiian?

A. I think as an average a little smaller. I am not sure.

Q. And probably do not draw as much water?

A. Well, our average draft is around 25-9 with a deck load of timber load line. We have two vessels with a deeper draft.

Q. In proceeding over these river channels, where do your ships tend to stay with reference to the center of the channel?

A. Well, that is pretty hard—the ships that I have been on have tended to stay on the right-hand side of the channel.

Q. How close, however, to the center line of the channel?

A. Well, that would vary with conditions, in making bends.

Mr. Young: That is all.

Mr. Wood: That is all, Captain Dyer.

(Witness excused.) [668]

CARL A. ANDERSON,

produced as a witness in behalf of the Respondents, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wood:

Q. What is your occupation, Captain Anderson?

A. A United States Assistant Inspector of

(Testimony of Carl A. Anderson.)

Hulls, Bureau of Marine Inspection and Navigation.

Q. In the office of the local Steamboat Inspectors here in Portland?

A. Yes, sir. At present I am acting local while Captain Joachims of the local inspectors is on vacation.

Q. You are, I take it, his assistant and act in his absence? A. That is right.

Q. You are, however, familiar with the records of your office? A. Yes, sir.

Q. And I will ask you whether or not the office of the local Steamboat Inspectors, here, acted on a collision between the diesel tugs with their tows, Twin Point and Modoc, which occurred on October 7, I think, 1938?

A. I believe that is the Tidepoint.

Q. Tidepoint and the Modoc? A. Yes.

Q. And your office conducted an investigation, did it not? A. Yes, sir.

Q. And made a decision on that collision, did it not? A. Yes, sir. [669]

Q. And is it not a fact that the Modoc, a tug with her tow, was condemned by your office and held in fault for coming up on the left-hand side of the river at Post Office Bar?

Mr. Young: Just a moment. I object to that question and move that it be stricken, your Honor, upon several grounds: that, in the first place, the office of which this gentleman is an assistant in-

(Testimony of Carl A. Anderson.)

spector is one which has only authorization to conduct investigations and make recommendations. It does not make final decisions upon any matters of this sort. In the second place, any findings which are made by these local inspectors at most show only the opinion of the Board with reference to the subject concerning the evidence which is adduced before them, and are nothing but opinions and therefore not in any sense binding. Moreover, there is nothing here to show that any notice of any opinions of this sort is given broadcast to pilots on the river or that they are in any sense bound whatever by them.

Mr. Wood: It is our position, your Honor——

Mr. Young: Pardon me just a moment.

Moreover, your Honor, there is nothing here to show in this case that this particular Inspector was even in the office of the local Inspection Bureau at the time that the accident to the Modoc and the Tidepoint took place, that he has any personal knowledge whatever of it, that the most that he could know about it would be what he has read in the record, and at the proper time, if counsel wishes to try to introduce the record, objection can be [670] made to that on other grounds.

The Court: Does he have the record with him?

Mr. Wood: I do not know.

Q. Have you the record with you?

A. No, sir. I haven't.

Mr. Wood: If your Honor please, my position

on that is this: I have brought him here, not for any claimed personal knowledge that he had of that collision, not that he was necessarily in that office, there, but as a man who knows the records of the case and merely to obviate the necessity of bringing the record up here and introducing it, which requires subpoenas duces tecum and some formality. I am only asking him to state what that decision was of his office, which he knows from the official record. So much for that.

Now, his office is the office which has jurisdiction over pilots, and in case of collisions it investigates and reprimands pilots or takes their licenses away or imposes some kind of disciplinary action on them, so that when this office, in a previous decision, decides, actually decides, officially, that that is a narrow channel where pilots must keep to the right, if it is safe and practicable for them to do it, and in that case it was tugs and tows, why that is a sufficient decision of the body in charge of pilots, and pilots are bound to observe that decision. Suppose, for example, that that local Inspectors' office decides one thing and they are the body having control of pilots, [671] and your Honor then decides another thing. What position is it going to put the pilots in? How do they know where they stand? That is my position, that when not only the law and the statute since 1907 has made this narrow channel rule the statute law, but this local Inspectors' office has decided that, in this very

place, it is a narrow channel where the vessel should pass port to port and a pilot is guilty if he comes up with a tow on the left-hand side, now is not that evidence that your Honor wants to hear?

Mr. Young: Now, if the Court please, I should like to be heard at some length upon this point.

The Court: Captain, step down. You will be more comfortable for the next half hour, now.

Mr. Young: Opposing counsel has stated to your Honor——

The Court: Who has the map, Mr. Bragg?

Mr. Young: ——that the gentleman who was just upon the witness stand, although having no knowledge whatever of the facts concerning this collision, without any showing that he was even in the office of the Inspector at the time that the investigation took place, but based solely upon presumably what he had read in this record which to him would be all pure hearsay, is at liberty to tell your Honor what that record shows. The various statements made by counsel as to what he claims that record shows——

The Court: Mr. Young, argue it as if the record were being offered. [672]

Mr. Young: Argue it as if the record were being offered? Very well, your Honor.

At this time, your Honor, I object to the introduction of the record upon the following grounds. In the first place, the record to which counsel is now referring involved the collision between two

motor river tugs and not an ocean steamer or a river tug carrying barges, or towing barges. In the second place, the record shows a complete absence of any issue ever having been raised whatsoever that it was neither safe nor practicable for river boats to use the west side of the river at that particular point. In fact, the case was tried with the parties completely ignoring any contention of that sort. Therefore, the issue which is now before your Honor was not even considered in that particular case. In the third place, there was no reference whatsoever made in the record of that case to any long-established custom of river boats to use the east side of the channel, nor was any reliance placed upon that point in reaching a determination upon that particular subject. In the fourth place, the pilots who were involved in that particular case were not subject to being disciplined by the Board for the reason that they were operating only motor boats, and therefore were not required to have licenses, and the Board had no jurisdiction in itself to discipline these men as individuals. Fifth, the Board, at most, under the statute, could do nothing more than make findings and recommendations. It had no power to reach final conclusions upon any matter [673] whatsoever. That had to be referred to Washington, and even after that, in this particular case, this involving only the operators of motor tugs, even the Department of Commerce in Washington was not in any position to do anything

with regard to these two individuals who were being charged at the time of this particular hearing. Next, the findings of the local Board of Inspectors under a decision of the United States Supreme Court in the case of the steamboat *Charles Warren*, 115 U. S. at page 70, at most shows only the opinion of the Board upon the subject from evidence adduced before them.

The Court: 117?

Mr. Young: 115 U. S., page 70.

The Court: What is it? 115?

Mr. Erskine B. Wood: 115.

The Court: Oh, yes.

Mr. Young: And finally, your Honor, without any preliminary showing in this case that there was any notice given by the Department of Commerce with respect to any decision made by that department, other pilots upon the river would under no circumstances be charged with knowledge thereof, and, indeed, there is nothing here whatsoever to even suggest, either as a matter of law or fact, that any findings or determinations made by this local marine board could have the effect of law which would be binding upon any other pilots. For that reason I object to the introduction of this particular record. [674]

Now, I may say further, by way of argument, that counsel's statement to your Honor a few moments ago, if your Honor were to examine that record, you would find would be refuted definitely

by the record, because the Board in that particular case determined that it had no power to impose disciplinary action upon these two pilots who were involved. Yet counsel has informed your Honor that the officers did, in fact, impose disciplinary measures upon these individuals. Moreover, counsel has said that there was a finding in that case that it was safe and practicable for river boats to use the west side of the river, and I am stating to your Honor upon an examination of that record that that matter was not even presented to the Board, all of which further shows the entire impropriety of counsel, by purely oral testimony of this witness, endeavoring to bring before your Honor matters which are necessarily found only in the record and matters which, in any event, would be entirely improper for the reasons that I have just enumerated.

The Court: If that record is admissible, the one in the present case would be admissible, would it not, Mr. Wood, for the same reason?

Mr. Wood: Well, I do not think that it would necessarily follow, your Honor.

The Court: Why not?

Mr. Wood: Well, I am offering the record in the first case for the purpose of showing that there has been a previous ruling by [675] the proper office having jurisdiction——

The Court: You are offering it on the basis of notice?

Mr. Wood: Yes.

The Court: Is that it? For its evidential value as notice?

Mr. Wood: Yes.

The Court: There is just a paragraph, there. Will you look at that paragraph, 115 U. S.?

Mr. Wood: Of course, I do not know this case, but I do not think this is applicable when I offer this record for a different purpose entirely. I am trying to show, your Honor, the confusion that must result in pilots' minds when the local Board of Inspectors decides a thing two years ago and then the pilots do not obey it and come along and try to persuade your Honor to decide something else.

The Court: Will you come back here, Captain, to the witness stand?

The objection——

Mr. Wood: If your Honor did not want to hear me,——

The Court: I do want to hear you, of course.

Mr. Wood: I only wanted to say this. Mr. Young said that that case did not involve a collision between a tug and an ocean steamer. That might go, possibly, to the weight of that decision as it affects this case, but it does not affect its competency or admissibility, nor does it go to the point at all that here is a previous ruling by these Inspectors that this is a narrow [676] channel where the port to port rule must be obeyed. Now, Mr. Young has said that there was no finding in that

(Testimony of Carl A. Anderson.)

case involving the issue of safety or practicability. Why, that issue of safety or practicability is necessarily involved when the Inspectors say that the vessel was not justified in coming up on the left-hand side because if she was justified in coming up on the left-hand side it would mean she did so because it was not safe and practicable to go on the other side? That is all there is to that. Now, the recommendation. He says it was only a recommendation. That is all the authority this office has. I think the record will show in that case that that recommendation by the Inspectors here was confirmed, when referred to their official superiors in Washington. Is not that a fact?

A. That is right, sir.

Mr. Young: If the Court please, this question and answer are also under the same objection.

The Court: I understand that, yes.

The testimony as offered in the present form as oral testimony from the witness is rejected. As to whether I would deem the record admissible, I must reserve ruling as to that, if it should be offered.

Mr. Wood: May I have an order, then, your Honor? You know the rules of this court require a court order to get a subpoena duces tecum, or will your Honor order this witness to please produce this record? [677]

The Court: Yes, I will so order, reserving decision on its admissibility.

Mr. Wood: Yes, your Honor.

Then, Captain Anderson, you need not leave the

(Testimony of Carl A. Anderson.)

stand right now, but you will bring the record up here.

The Court: Bring the whole record. Bring everything pertaining to the case if you bring anything.

A. All right, sir.

Mr. Wood: Q. Now, I want to ask you one other question. There seems to have been some question here in this case as to whether these craft as shown in this photograph of the Western Transportation Company paper barges are barges or scows, as that term is understood in the Inspectors' regulations.

Mr. Young: Did you ask a question?

Mr. Wood: I am asking for his statement as to what they are.

Mr. Young: That is objected to, your Honor, upon the ground that——

Mr. Wood: As he interprets it.

Mr. Young: ——that there is no showing that this individual is anyone who has the power to determine what those particular boats may be. His conclusion in his own mind upon the matter would be utterly immaterial so far as the Court is concerned.

The Court: Qualify him a little further, will you, Mr. Wood?

Mr. Wood: Q. Captain Anderson, the lights that are to be carried by barges or scows are prescribed by the regulations [678] promulgated by your department, are they not?

(Testimony of Carl A. Anderson.)

A. Yes, sir.

Q. And how long have you been at work in that department?

A. Well, I was appointed in Baltimore in March, 1937, and was transferred out to Portland, Oregon, and reported here December 17, 1937.

Q. And you know where the rules are, the Pilot Rules, or the Inspectors' regulations, concerning lights on barges and scows, do you not?

A. Yes, sir.

Q. And you know what those rules are?

A. Yes, sir.

Q. Now, it is part of the functions of your office to see if those rules are complied with, is it not?

A. Yes, sir.

Q. And the rules are not the same for barges as they are for scows, are they? A. No, sir.

Mr. Wood: I think with that qualification I will repeat the question.

Q. Are these craft of the Western Transportation Company——

The Court: In your opinion.

Q. ——in your opinion barges or scows?

Mr. Young: The same objection as before.

The Court: He may answer subject to the objection. [679]

A. In my opinion I would consider them lighters or scows, and may I refer to——

Mr. Wood: Q. Yes, but may I ask you——“lighters or scows”—is a lighter a scow?

(Testimony of Carl A. Anderson.)

A. Yes, sir.

Q. And is a scow a lighter? I do not quite get that distinction.

The Court: In your opinion are they barges?

A. No, sir.

Mr. Wood: Q. Very well. Now, you were going to refer to something.

A. I was going to refer to the definition by the Department of a lighter, of June 20, 1929, which gives the definition of these different craft, here.

Q. Yes. A. May I read them?

Mr. Young: I object to the witness reading this letter, your Honor, for the reason that it is not in accordance with the statute at all or the Pilot Rules, that the Pilot Rules, themselves, will have to be construed by your Honor as to what their meaning is, that this is only an informal letter which the witness is now purporting to read from, that it would not under any circumstances be binding upon the operators or pilots of barges or scows or lighters in this particular harbor.

The Court: Whom is the letter by?

A. It is from the — [680]

Mr. Young: This, moreover, is not a lighter——

A. ——Supervisor Inspector General Hoover at Washington, D. C.

The Court: Hoover?

A. Yes, sir.

Mr. Young: I wish to add, also, your Honor, there is nothing here to show any authority in this

(Testimony of Carl A. Anderson.)

Mr. Hoover to promulgate any informal regulations, that the Pilot Rules govern upon this matter.

The Court: I will reject the letter in evidence, but it may be referred to in argument, Mr. Wood.

Mr. Young: May I except to your Honor's ruling upon that point, because if the letter is not to be introduced in evidence it certainly will be objectionable for counsel to be referring to it in argument. Counsel is not at liberty, if the Court——

The Court: Mr. Young, do you mean to tell me that when we are dealing with administrative matters that we may not take within the judicial ken in argument administrative rulings and practices, that when a labor relations question is being presented in this or any other court, for instance, that references may not be made to the administrative rulings for such aid as they may be, made by the National Labor Relations Board?

Mr. Young: Well, if it is first, as a preliminary matter, shown that the particular board or the official in question is one whose duty it is to promulgate certain regulations, that is one thing.

The Court: I will admit the letter now in evidence subject to [681] the objection. Have a copy made and put it in evidence subject to the objection, Mr. Wood.

Mr. Wood: Very well.

Mr. Young: May I see the letter, your Honor?

The Court: Certainly.

(A copy of the letter, so offered, was received

(Testimony of Carl A. Anderson.)

in evidence and marked Respondents' Exhibit 14.)

RESPONDENTS' EXHIBIT No. 14

(Copy)

E 230
Circular Letter. June 20, 1929.

U. S. Supervising, Traveling, Local and
Assistant Inspectors,
Steamboat Inspection Service.

Subject: Definitions for barge, scow and lighter.

From recent correspondence that the Bureau has had in connection with definitions for barge, scow and lighter, it has occurred to the Bureau that the report adopted by the Board of Supervising Inspectors at its recent session covering these definitions might be of assistance to you, and the same is quoted below:

“The communication submitted states in part as follows:

‘Requests the Board of Supervising Inspectors to define barge, lighter, and scow, and prescribe lights to be carried by lighter, in tow of steam vessel’ and is replied to as follows:

DEFINITIONS

Barge

A barge is a type of vessel of ship-shaped superior construction being fitted with a rudder and constructed for the carrying of cargo under deck. It has no motive power of its own.

(Testimony of Carl A. Anderson.)

Living quarters are provided for the crew, who attend to the steering, pumping, etc., incident to the voyage.

Scow

A scow is a flat-bottom structure of broad beam and square ends and is generally used to transport mud, coal, garbarge and like cargoes. It might be termed as of inferior type of construction. It does not carry cargo below deck and is of an open body type. It is without steering gear or control of its own.

Lighter

A lighter is a broad beamed, flat-bottomed craft, one type decked from end to end and the other type is fitted with a superstructure. Upon both types, no rudder is provided for steering control. By interpretation of intent as to the carriage of lights, it is set forth as a ruling by the Commissioner of Navigation and Supervising Inspector General, under date of March 26, 1923, file no. 3819 that a lighter is an inferior type of vessel as comparable with barges and canal boats.

Therefore your Committee reports that it is of the opinion that lighters should carry as follows, as prescribed for scows, namely:

“Scows when being towed by steam vessels on the waters covered by the first paragraph of these rules shall carry a white light at end of

(Testimony of Carl A. Anderson.)

each scow (each end) except that when such scows are massed in tiers, two or more abreast, each of the outside scows shall carry a white light on its outer bow, and the outside scows in the last tier shall each carry, in addition, a white light on the outer part of the stern * * *''

D. N. HOOVER

Supervising Inspector
General

[Endorsed]: Filed Jul. 23, 1941.

Mr. Wood: Just waiting while he reads the letter.
A. That is all right.

The Court: Step down a moment, will you, Captain, please?

Mr. Young: I have seen it, your Honor.

The Court: I wish you would develop your position about scows and barges more fully than you have. Who has the barge side of it and who has the scow side of it? Are you a scow man or a barge man?

Mr. Young: I am a lighter man.

The Court: What are you, Mr. Wood, a barge man or a scow man?

Mr. Wood: Well, personally I think they are scows, but it does not make much difference to me, because, whether they were barges or scows, I do not think the lights were in accordance with the regulations, but I think your Honor ought to be

informed about the official ruling about it. I think they are scows.

The Court: You claim they are scows, and you are holding them to the standards of scows? [682]

Mr. Wood: That is what I think.

The Court: And those are more severe than the standards for barges?

Mr. Wood: I do not know as they are more severe. They require different kinds of lights.

The Court: And you say what, Mr. Young?

Mr. Young: I shall be compelled to make a rather lengthy statement upon this subject, your Honor.

The Court: You might just as well do it now as later.

Mr. Young: Very well.

I am very frank to say that I am uncertain as to what these are. In fact, I have not been able to find anybody who can tell me what these particular boats are. They have, throughout this trial and in the previous proceedings, been called barges, but, in speaking of them as barges, they have been called barges not in any technical sense, but, rather, in the sense that river boat men just generally have to have a word to cover the particular situation, and the word "barge" seemed to be about as general as any. If your Honor will examine these Pilot Rules upon the question of the lights that are to be placed upon barges and scows, you will find that, while there are certain requirements set forth as to what those lights shall be, the Pilot Rules are absolutely silent as to what a barge is, as to

what a scow is, as to what a lighter is. Now, if you will look up in the dictionary the word "barge" or the word "scow," you will find that [683] both of them are flat-bottomed boats that are ordinarily used for hauling purposes in rivers. What possible assistance have you gained, then, with reference to what the meaning of a barge is as distinguished from a scow, or even from a lighter? Now, it is because of that circumstance that it has been our position that the Pilot Rules are so utterly hazy and indefinite in their meaning that nobody can tell what these boats are required to carry under any particular circumstances. If the Pilot Rules contained a definition of the term "barge," and then said what kind of lights a barge must have, then we could readily determine whether or not these particular boats are barges within the meaning of the Pilot Rules. Moreover, if the Pilot Rules contained a definition of the word "scow," and said what lights have to be carried by scows, we could apply the definition to these particular boats and decide whether or not we had to have that sort of light. On the other hand, if they happen to be lighters, the curious part about it is that the Pilot Rules do not contain any requirement as to any particular kind of lights that the lighters must actually carry except that, in the case which was referred to in the evidence, here, at an earlier time, in the case of vessels which are on certain Eastern rivers, there is this language—and I think this is of some value

from the standpoint of interpreting the Pilot Rules—it is that “When nondescript vessels known as scows, car floats, lighters, barges or canal boats, and vessels of similar type, are towed alongside [684] a steam vessel, there shall be displayed a white light at the outboard corners of the tow.” Now, that is the nearest approach that you can get anywhere in these Pilot Rules to what these particular boats were supposed to have at this particular time, because all of them are lumped together as barges, scows, and lighters. There is no distinction among them. Now, it is true that this particular section that I read to your Honor has to do with lights for barges and canal boats on the Hudson River and adjacent waters and Lake Champlain, but the curious part about it is that the lights that are referred to there are actually the lights that were on the boats that we had at the time of this accident, and, as the witnesses, at least up to this stage, have uniformly testified, they are the lights that for years and years and years last past have been used on boats that are being towed by other boats, and therefore it would seem that in view of the uncertainty as to the meaning of these Pilot Rules and the fact that when the Pilot Rules did at one time talk about nondescript vessels such as scows, car floats, lighters, barges, and canal boats and simply said they must display a white light at the outboard corners of the tow, it seems that we have done the sensible thing by putting the lights on the outside of those boats.

Now, referring specifically, your Honor, to what these Pilot Rules say about barges, let me read this, at page 26: "Barges or canal boats shall, when being propelled by pushing ahead of a steam vessel, display a red light on the port bow and [685] a green light on the starboard bow of the head barge or canal boat, carried at a height sufficiently above the superstructure of the barge or canal boat as to permit said side lights to be visible; and if there is more than one barge or canal boat abreast, the colored lights shall be displayed from the outer side of the outside barges or canal boats." In other words, if anybody could tell what a barge was, within the meaning of this particular section, and if there were no argument as to whether the boat in question were a barge, then, under this section of the Pilot Rules, the barge would be required to have a red light on the port bow and a green light on the starboard bow. In other words, they would be identical lights with those that already appear as the running lights on the starboard and port sides of the Barry K, itself. Now, continuing: "Scows when being towed by steam vessels on the waters covered by the first paragraph of these rules shall carry a white light at each end of each scow, except that when such scows are massed in tiers, two or more abreast, each of the outside scows shall carry a white light on its outer bow, and the outside bows in the last tier shall each carry, in addition——"

Mr. Wood: "Outside scows."

Mr. Young: —“outside scows in the last tier shall each carry, in addition, a white light on the outer part of the stern. The white light shall be carried not less than 8 feet above the surface of the water, and shall be so placed as to show an [686] unbroken light all around the horizon, and shall be of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least 5 miles.” Now, if anybody could determine from a reading of that what a scow is, and, if it were admitted that these particular boats were scows, then they would have to have the lights that are referred to in that particular section.

And, incidentally, I may call your Honor’s attention to the circumstance that under this section the lights called for are lights which are white lights. They must be not less than 8 feet above the surface of the water and so placed as to show an unbroken light all around the horizon. In other words, even though they blind the pilot in the pilot house, that would make no difference. You would have to have those particular lights on the scows.

Now, your Honor, our position, I think I have stated, is simply this: that you can read those Pilot Rules from one end to the other and you cannot get any light on what is meant by the term “barge,” by the word “scow,” or by the word “lighter.” If they were barges, then they would have to have the red and green; if they were scows, then they would have to have these lights showing all around the

horizon a distance of five miles; if they were lighters, the rules are silent as to any specific requirements as to what they were to have, except that in the Eastern rivers they have these white lights on the outer corners. The white lights are the ones that all of the boats in this harbor— [687] that is, all of the scows or lighters or barges or whatever you call them—have been carrying when they have either been on the nose of the towboat or the starboard or the port side.

I say then to your Honor, under these circumstances, that in view of the hastiness and indefiniteness of the Pilot Rules, and in view of the circumstances, that if there is a violation of those Pilot Rules, the Inspectors may make investigation and may make recommendations as to what is to be done, that those Pilot Rules have got to be construed strictly, and that since no body can distinguish among the various types of boats that were there referred to in any particular case, it seems to me that no particular pilot would ever be held guilty of violating these rules when he does not know what they actually mean.

Now, there is one thing further that I have called to your Honor's attention, and that is, presumably the local investigation board here knows what *it* is going on in the rivers; and yet, as the testimony shows, for years and years last past it has been the practice to carry just these lights of the kind that we have testified were on the boats that were being pushed by the Barry K. Under those circum-

stances, I would say that there is no violation of Pilot Rules here involved, and that, so far as the accident here is concerned, it is perfectly patent that if your Honor believes the testimony of the witnesses for the Libelant, at least, the lights, themselves, bore no proximate relation to the accident, because the people on board the other [688] ship actually saw her when we were a mile away.

Mr. Wood: I am not going to be very long, your Honor. I only want to say this: The very fact that Mr. Young has stated, that the printed Pilot Rules do not define barges and scows, is the reason that the Department issued this circular official letter which does define them, and I think it is just as binding on the office and on the owners of the barges and scows as if you print it in these rules. It is an official letter and a decision with a definition by the Supervising Inspector General of this Service in Washington.

The Court: While we are on the subject of lights, the two white lights on the mast of the Barry K having been referred to as showing that she had barges——

Mr. Young: Yes, she was pushing barges, your Honor.

The Court: ——or the lighters——

Mr. Young: That is right.

The Court: ——in tow——

Mr. Young: No. May I correct that? If it had been a tow that was being pulled—that is to say, a log raft—then there would have been three lights.

Mr. Wood: I think not less, unless it was a hawser more than six hundred feet long. Is not that correct?

Mr. Young: No, that is the old rule. That has been changed. There is no question of the length.

The Court: Those things are all in the Pilot Rules, are they? [689]

Mr. Young: Yes, your Honor.

The only point I want to clarify in your Honor's mind now is that the two lights that were above the pilot house in this case showed that we had one or more barges that were lashed to the boat that were being pushed.

Mr. Wood: Not necessarily pushed. They might have been alongside.

Mr. Young: One of them was alongside, but I mean in contact with the boat. If it had been a tow behind with a long hawser, then there would have been three lights there.

The Court: You say "barges" for want of a better term?

Mr. Young: Yes. I prefaced that when I made my remarks that you have to have some word, and that is the most convenient one.

The Court: Does the Captain need to come back? I have ruled that a copy of that may be put in evidence.

Mr. Wood: He has to bring that record back.

The Court: I mean on this point, now. Is he needed on the stand now further?

Mr. Wood: I really do not know. When I read this letter which your Honor has admitted, I think you might want to ask something about it. I think inasmuch as your Honor has admitted this letter I should read it to your Honor now. It is a circular letter——

The Court: It must be in your favor, Mr. Wood. I did not think it necessary to read it. I shall be glad to hear it. [690]

Mr. Wood: "From recent correspondence that the Bureau has had in connection with definitions for barge, scow and lighter, it has occurred to the Bureau that the report adopted by the Board of Supervising Inspectors at its recent session covering these definitions might be of assistance to you, and the same is quoted below:"

The Court: The date of the letter, Mr. Wood.

Mr. Wood: June 20, 1929.

"The communication submitted states in part as follows:

" 'Requests the Board of Supervising Inspectors to define barge, lighter, and scow, and prescribe lights to be carried by lighter, in tow of steam vessel' and is replied to as follows:

" 'DEFINITIONS

" 'Barge A barge is a type of vessel of ship-shaped superior construction being fitted with a rudder and constructed for the carrying of cargo under deck. It has no motive power of its own. Living quarters are

provided for the crew, who attend to the steering, pumping, etc., incident to the voyage.

“ ‘Scow A scow is a flat-bottom structure of broad beam and square ends and is generally used to transport mud, coal, garbage and like cargoes. It might be termed as of inferior type of construction. It does not carry cargo below deck and is of an open body type. It is without steering gear or control of its own.

“ ‘Lighter A lighter is a broad beamed, flat-bottom craft, one type decked from end to end and the other type is fitted with a superstructure. Upon both types, no rudder is provided for steering control. By interpretation of intent as to the carriage of lights, it is set forth as a ruling by the Commissioner of Navigation and Supervising Inspector General, under date of March 26, 1923, file No. 3819 that a lighter is an inferior type of vessel as comparable with barges and canal boats. [691]

— “ ‘Therefore your Committee reports that it is of the opinion that lighters should carry as follows, as prescribed for scows, namely:’ ”
Then to quote the rule applicable to scows.

In other words, this letter classes lighters and scows as the same, and says that the Pilot Rules applicable to scows are applicable to lighters.

Will you make a copy of that (speaking to reporter)?

Mr. Young: Will you make an extra copy for me, please?

The Court: Do you have other witnesses, Mr. Wood?

Mr. Wood: No, I did hope to get one, but I was not able to find him.

The Court: Then when the Captain brings the record back and we bring that controversy to a close, that ends your case in chief?

Mr. Wood: I think it will.

The Court: You can come back in fifteen or twenty minutes.

A. Yes, sir.

The Court: Do it as quickly as you can and we will recess until you return.

The Court: And will you have anything in rebuttal this morning, Mr. Young?

Mr. Young: I think so, your Honor, yes.

The Court: Is this your last witness?

Mr. Wood: Yes.

The Court: We will recess this hearing, now, until the [692] Captain returns.

(Witness withdrawn.)

(Thereupon at 9:45 o'clock A.M. a recess was taken.)

The Court: Come up, Captain, please.

CARL A. ANDERSON,

resumed the stand as a witness in behalf of the Respondents, and, having been previously sworn, further testified as follows:

Direct Examintion

(Continued)

The Court: Captain, you are familiar, of course, with the type and severity of the penalties and the number that are recommended by the Inspectors in collision cases? A. Yes, sir.

The Court: How does that run in a year, the instances growing out of collisions, where disciplinary recommendations are found necessary?

A. Oh, I should say seven or eight cases.

The Court: Seven or eight a year?

A. Yes, sir.

The Court: Well, that involves, of course, a wide variety of craft?

A. Yes, sir.

The Court: Collisions as serious as this one we are dealing with in this case, there are not a great many of them, are there?

A. No, sir. Probably one every year, probably.

[693]

The Court: And what are the maximum and the minimums, if any, that the Board, under the statute and regulations, may recommend? I suppose a permanent suspension of the pilot's license?

A. Yes, sir.

The Court: That is the maximum?

(Testimony of Carl A. Anderson.)

A. Yes, sir.

The Court: And is there a minimum?

A. One day.

The Court: That is the minimum. Have there been any permanent suspensions in your experience?

A. No, sir. Not to my knowledge.

The Court: About how do they run, usually? Just call off a few of them.

A. Sixty days, ninety days.

The Court: Now, you continue your questioning, Mr. Wood, about his records, please, if there are any further preliminary questions.

Mr. Wood: I just wanted him to produce the record.

Q. You have brought it, have you, Captain?

A. Yes, sir.

Q. In that case of the Modoc?

A. Yes, sir. Tidepoint.

Q. Will you please——

The Court: Now,—— [694]

Mr. Young: Pardon me. Are you now formally offering the record?

Mr. Wood: Yes, I am offering it and asking that it be submitted to his Honor.

Mr. Wood: The Libeant objects to the record upon the grounds that we specifically enumerated earlier this morning.

The Court: Yes.

(Testimony of Carl A. Anderson.)

Mr. Young: I assume your Honor is overruling the objections or taking it under advisement.

The Court: No, I am going to admit it subject to the objection, Mr. Young. I have not made up my mind now as to whether I should consider this as part of the record or not. I think I should follow the practice which is not uncommon in these cases and other cases tried without a jury of admitting it subject to objection, so even though I should conclude—I will, of course, read it to the extent necessary to make up my mind on its admissibility and as to whether I shall feel it competent in the case, so that I may consider it in making my decision. I have not made up my mind as to that. So the ruling is, it is admitted subject to the objection.

Mr. Wood: Would your Honor care to have the witness——

The Court: Now, a practical question arises about this man's originals. They do not like to leave those here, usually, particularly this kind of a department.

Mr. Wood: I do not think there is any objection to leaving [695] it here for a reasonable length of time, is there, Captain?

A. No, sir.

Mr. Wood: It is in the custody of the Court.

The Court: Very well.

(The record, so offered, was admitted in evidence, subject to Libellant's objections and marked Respondents' Exhibit 15.)

(Testimony of Carl A. Anderson.)

Mr. Young: If the Court please, subject to the general objection which I made to the admissibility of the record at all, if the matter is to be in the record I have no objection to a copy being substituted for the original, the only difficulty in this case being that the record is rather voluminous.

The Court: I thought perhaps it was.

Mr. Wood: If it becomes necessary to copy it, if your Honor decides to admit it, I think we could probably——

The Court: I have admitted it now subject to the objection, so it is in the record permanently.

Mr. Wood: I think counsel and I could agree, subject to your Honor's approval, to having what we might regard the pertinent parts of it copied. I do not think it is necessary to copy it all.

Mr. Young: All being subject to the objection, we can probably make the agreement.

The Court: I think—any further questions from the Captain? [696]

The Court: Are there any other penalties permissible by law or regulation other than suspension or cancellation of a pilot's license? Are there fines?

A. Violations and fines; yes, sir.

The Court: And fines?

A. Yes, sir.

The Court: What are the maximums and minimums?

A. Two to three hundred dollars, page 10 of the Pilot Rules.

(Testimony of Carl A. Anderson.)

The Court: Is it customary to assess fines?

A. Cite them for violations; yes, sir.

The Court: That is rather usual, is it?

A. Yes, sir.

Mr. Wood: Q. Where there is no loss of life, however, the disposition of the Inspectors is to be pretty lenient, is it not?

A. Well, they make—they cite them for violation and it goes to the Bureau, and the Customs, they collect the money.

Q. But you did not get my question. I say, where there has been no loss of life the disposition of the local Inspectors is to be pretty easy on the offending pilot, is it not? A. Oh, yes, sir.

The Court: That is all, Captain.

Mr. Wood: That is all.

Mr. Young: Just a moment, Captain. [697]

Cross Examination

By Mr. Young:

Q. To your knowledge, has there ever been an investigation conducted by your Board with reference to the propriety of any particular lights carried by barges, scows, or lighters in the river?

A. Offhand, no, I don't know, sir.

Q. You do not know of any? A. No, sir.

Q. If it had occurred since 1937, during the time that you have been with the local board, you would probably know about it, would you not?

A. Yes, sir.

Q. Captain, with reference to this record which

(Testimony of Carl A. Anderson.)

the Court, subject to the objection, has admitted in evidence, regarding the collision between the Tidepoint and the Modoc, does your Board give any notice of that decision to anyone other than the parties involved? A. That is right.

Q. Just the parties? A. Yes, sir.

Q. And in the case of this Modoc, then, the only people that received any formal notification from your office about it would have been the two pilots who were involved there. Is that right?

A. Yes, sir.

Mr. Young: That is all. [698]

Mr. Wood: That is all, Captain.

The Court: Thank you, sir.

Mr. Wood: Thank you very much.

(Witness excused.)

Mr. Wood: That, your Honor, is our case. I would think that we have not produced and do not intend to produce the assistant engineer who was on watch in the engine room in the Pennsylvanian, because no question is involved. The testimony has been that all orders to the engine room were promptly carried out, and he is no longer in the employ of this company. In fact, I do not know where he is. And neither shall we produce this man who was referred to as the standby man. I do not know where he is, but Captain Vaux tells me he is no longer with the ship. Is that correct, Captain?

Captain Vaux: That is right; yes, sir.

Mr. Wood: So with that explanation,—

Mr. Young: As long as counsel has made a statement, your Honor, on the point, I should like to inquire of counsel as to what effort he has made since the time of the accident to keep in touch with these men. Counsel has known that an accident involving substantial damage took place and that, presumably, there was going to be litigation, and I should like to inquire as to what effort he has made to keep in touch with these men. [699]

Mr. Wood: I have never regarded a standby man of any importance and made no effort. The assistant engineer, I have communicated with the head office in San Francisco and they have informed me of the facts I have stated.

Mr. Young: What do you have to say about the man who was at the wheel of the Pennsylvanian?

Mr. Wood: The same thing. He is no longer in their employ, and I do not think his testimony is of the slightest importance. The helm orders were all obeyed. That is uncontradicted. There is no question, here, of helm, no question of the ship going the wrong way, in which she was not intended to go.

Mr. Young: He was up in the pilot house looking at the Barry K, was he not?

Mr. Wood: It would be presumed he was giving his attention to the helm and the orders that he got.

Mr. Young: In any event you cannot produce him.

Mr. Wood: That is correct.

Mr. Young: You have made no effort to obtain depositions of any of these men that are not present, have you?

Mr. Wood: No, but if you would like me to, and regard it of any importance, and the Court would like me to do it, I will try to get their depositions if you want them and the Court says it must be done.

Mr. Young: They are not going to be my witnesses. They are your witnesses. It is for you to determine. [700]

Mr. Young: If the Court please, yesterday when Captain Vaux was upon the witness stand, I brought out on cross examination that a man by the name of Wayne Swearingen was the lookout on the Pennsylvanian, and it was not known where he now was and he would not be produced as a witness. Opposing counsel at that time offered to permit the use of the testimony of Wayne Swearingen before the local Inspection Board and I at that time made a qualified acceptance of his offer on the theory that I would be willing to have that part of the transcript read to the Court, thought it should not be binding upon the Libelant. Counsel then stated that his offer was an unconditional one. Do I understand that offer is still open?

Mr. Wood: Yes.

Mr. Young: At this time, then, I accept——

Mr. Wood: You can read his whole testimony.

Mr. Young: At this time I accept the offer un-

conditionally and ask leave to read it to your Honor.

The Court: You will not need to copy it. You can put it in as an exhibit, can you not, Mr. Young?

Mr. Young: I will have to have it made. This is the entire transcript. But I shall be glad to have that done.

LIBELANTS' EXHIBIT No. 16

“WAYNE SWEARINGEN,

Route 2, Box 474, Jacksonville, Florida, being first duly sworn, testified as follows:

“Chairman Hill:

“Q. Do you hold a Federal license or Certificate?

“A. Identification Certificate Z 199145; and Certificate as [701] Ordinary Seaman, Wiper, Messman and Utilityman E-227946, issued Jacksonville, Florida, November 19, 1940.

“Inspector Joachims:

“Q. Were you employed as Lookout on the S.S. Pennsylvanian when that vessel collided with the tow of the steamer Barry K on February 1, 1941? A. Yes.

“Q. Where were you stationed?

“A. On the bow.

“Q. How long had you been there before the collision?

“A. Went on about 12:10 a.m.

“Q. And the collision occurred about 12:55 a.m.? A. Yes.

“Q. When the Pennsylvanian was proceeding down the Willamette River and you first saw the Barry K, about how far away was she?

“A. About a mile.

“Q. What lights did you see on that vessel?

“A. Saw white lights.

“Q. Did you see her side lights?

“A. No, sir.

“Q. How many white lights did you see?

“A. A bunch of them.

“Q. You saw white lights only?

“A. Yes, Sir.

“Q. Hear any signals?

“A. Yes, heard whistles from the Barry K. Both ships.

“Q. What was the first whistle you heard from the Barry K?

“A. I don't remember.

“Q. Was it one blast or two blasts?

“A. I don't remember. Couldn't see.

“Q. What was the first whistle from your own ship?

“A. Wouldn't be able to say.

“Q. But you did hear whistles?

“A. Yes, I heard whistles. [702]

“Q. When the two vessels became very close to each other, and you were standing on the bow just before the collision, could you tell how they were in respect to one another?

“A. No, I could not. Except that the barge was coming across in front of us.

“Q. Port or starboard side? A. Port.

“Q. Did you see any lights on the barge?

“A. I think there were lights on it. I wouldn't say for sure.

“Q. What lights were they? What color?

“A. I wouldn't be able to say.

“Q. Whereabouts on the barge do you believe you saw the lights?

“A. On the corners.

“Q. Were they white lights?

“A. I don't know.

“Q. Were they on the top or side of the barge? A. Don't remember.

“Q. Could you tell how far from the top of the deck they were? A. No, Sir.

“Chairman Hill: When you saw the lights approaching up the river, did you notify the bridge?

A. I did.

“Q. Any questions by parties at interest?

“(None)

“Witness excused.”

[Endorsed]: Filed Jul. 23, 1941.

Mr. Wood: I also allow counsel to introduce in evidence the testimony before the Inspectors of the helmsman, Mr. Meagher, who is not here, and of the third assistant engineer, if he deems it of any

importance. I also offer to let him use the assistant engineer's bell book which is also here.

Mr. Young: The very kind offer of counsel is hereby rejected.

The Court: What bell book? [703]

Mr. Wood: The bell book kept in the engine room. In fact, those are all included, of course, in the offer I made to put in the whole testimony before the Inspectors, on which your Honor reserved ruling.

The Court: I think we ought to have the bell book in if we have the one on the bridge in.

Mr. Young: Are you referring to the bell book that has already been testified from by the witnesses, Mr. Wood?

Mr. Wood: I am referring to the bell book kept in the engine room.

The Court: You suspected the other one was.

Mr. Wood: I offer it.

Mr. Young: It is subject to objection by the Libelant on the ground that the man who made that book is not here available to be cross examined.

The Court: You are talking about the bridge bell book?

Mr. Young: No; I understand the engine bell book.

The Court: I know what I am talking about. I am talking about the bridge bell book, and that is the one Mr. Wood was talking about, are you not?

Mr. Wood: The bridge bell book——

The Court: It is not in evidence.

Mr. Wood: Yes, and I am very glad to offer it.

The Court: It is admitted.

(The Bridge Bell Book so offered and received was marked Respondents' Exhibit 17.)

Mr. Young: I do object to the bridge bell book. I misunderstood counsel. [704]

The Court: Is there any way to identify the engine room bell book?

Mr. Wood: It was identified in the testimony before the Inspectors, and, of course, a copy of it is in the Inspectors' transcript and might be compared with this original.

The Court: Mr. Young objects to it on one ground for want of identification.

Mr. Wood: I do not know how it could be identified otherwise, but I will ask these gentlemen.

Captain Vaux says he can identify it.

The Court: What other grounds of objection do you have?

Mr. Young: The principal ground of objection, your Honor, is not the one which your Honor just mentioned but rather that since the man who made this book is not here to testify it is impossible to question him in regard to it.

Mr. Wood: May I say a word, your Honor? I am not pressing the introduction of this book. I offered it to counsel. If he wants to have it in it can go in——

Mr. Young: I have not asked to have it in.

Mr. Wood: —in connection with the testimony before the Inspectors, which he can also have. It is immaterial to me, if he wants it or if your Honor wants it.

The Court: Are there any inconsistencies in that book?

Mr. Young: I have never seen his book.

Mr. Wood: You have seen a copy in the Inspectors' office. [705]

Mr. Young: I am sorry.

The Court: Is it so a white man can read it, or has it some of those hieroglyphics? I am interested, as a matter of justice and good sense, in seeing whether it conforms to the bridge bell book.

Mr. Young: If your Honor please, if the man who kept that book were here I, of course, would have no objection to its going in. I do not know what the book says and I, for that reason, am objecting to it.

The Court: And you do not want to read it?

Mr. Young: Yes, I will read it.

Mr. Wood: Those hieroglyphics, you understand, are standard.

The Court: You can check it with the other book between now and the next session, Mr. Young.

Mr. Young: Just offhand, it does not mean anything to me, because it has a set of hieroglyphics, or symbols, I think counsel called them, that—

Mr. Wood: Mr. Young, you have a copy of the investigation of the Inspectors, including, I think, a copy of that book. If you want to compare that with this you will see what they mean.

Mr. Young: I am sorry, Mr. Wood. I do not have. However, I will look this book over and see what I make out of it.

Is that all for the time being on that point, your Honor?

The Court: I just want to remind you that there is a very broad Federal statute permitting records kept in the course of [706] business that are self-proving. You will find it in 28 U. S. C. A., and it does not seem to me that your objection is sound, that the keeper of the record is not here to be subject to cross examination, in view of that very liberal statute and the very liberal application that has been given to it by the United States Supreme Court and lesser Federal courts.

Mr. Young: That liberal statute to which your Honor refers, however, has not changed the rules of evidence, so far as I know. What that statute has done is simply to declare certain documents to be public records——

The Court: No, no. I am not talking about a public record statute at all.

Mr. Young: You are talking about a different statute?

The Court: I am talking about the model course of business statute that is being enacted all over the United States. We have one here in Oregon, have had for years. It is commented on very favorably by Wigmore way back in his earlier editions. That was followed five or six years ago or longer by a Federal statute, and it says in plain words that

any record established to have been kept in the course of business is admissible for whatever probative value the tryer may give to it.

Mr. Young: The only point I am making is, your Honor, that I am seriously urging on this point, that as a matter of fairness it is perfectly obvious that if a record of this sort goes in unexplained and there is no possibility of examining the man [707] that made the record, the opposing party naturally is placed at a very serious disadvantage.

The Court: If you are not familiar with that statute, will you take a look at it, please, between now and the next session?

Mr. Young: Does your Honor have the citation conveniently there?

The Court: I can find it pretty soon.

Mr. Young: I have two short rebuttal witnesses that I can put on at this time, your Honor.

The Court: Yes. Do that, please.

Rebuttal [708]

WM. A. REED,

recalled as a witness in behalf of the Libelant, in rebuttal, testified further as follows:

Direct Examination

By Mr. Young:

Q. Captain Reed, I don't recall whether you testified on this, but do you carry a pilots license to operate ocean-going vessels? A. No, sir.

(Testimony of Wm. A. Reed.)

Q. You do not? A. Well, yes, I do.

Q. And what ocean-going vessels?

A. American vessels.

Q. And have you made application to become a member of the Columbia River Pilots' Association?

A. I have.

Q. When did you make that application?

A. Oh, about ten years ago, approximately; about ten years ago.

Q. Have you ever been admitted to membership?

A. No, sir.

Q. Captain, there has been some testimony in this case to the effect that persons on board the Pennsylvanian observed what have been described as white deck lights on the Barry "K" just before the accident occurred. Will you state whether or not there were any deck lights, white or otherwise, on the Barry "K"? [709]

A. No, sir, there were not.

Q. What is meant by the term "deck lights"?

A. Well, it is a string of lights on the outside of the house, which they use for working on log rafts or barges after night.

Q. Now, examining Libellant's Exhibit 5, could you point out to the Court the position where deck lights would have been had the Barry "K" been equipped with them?

A. Yes, sir, I can. They would have been right along underneath the edge of this deck, right along the house.

(Testimony of Wm. A. Reed.)

Q. The underneath part of the deck to which you are referring would be about how far above the water line?

A. About eleven or twelve feet, anywhere from ten to twelve feet.

Q. I see. And do I understand that you did not have any such lights on the Barry "K"?

A. No, sir, there is none.

Q. And that would be true of both the starboard and port side? A. Yes, sir.

Q. In so far as white lights were concerned, were they confined to the two mast lights to which you have testified? A. Yes.

Q. And to the lights on the barges?

A. Yes, sir.

Q. Captain, do either of these boats that we have called barges, numbers 22 or 24, have a rudder?

A. No, sir. [710]

Q. And did either of them have crew's quarters?

A. No, sir.

Q. There has been some testimony in this case, Captain, that men in the pilot house of the Pennsylvanian, when they observed just your two white mast lights and either the red or the green side lights, were not from those able to determine whether your boat was on the east or the west side of the river. I will ask you to state whether or not there are any other guide lights of any sort along the river there which would be of assistance to persons on the Pennsylvanian that night in determining the position of your boat?

(Testimony of Wm. A. Reed.)

A. Well, I think Post Office Lower light would indicate that.

Q. Post Office Lower light? A. Yes, sir.

Q. And are there lights on the east side of the river which would be of assistance in that regard?

A. Post Office No. 3.

Q. No. 3? A. Yes, sir.

Q. And is there any guide light downstream on the west side which would be of assistance to persons on the bridge of the Pennsylvanian?

A. I don't know whether they could see Gillihan's or not from their position at that time. If they could have seen it, it would have been. [711]

Q. To what extent at all would the white deck light—or I mean white lights on the corners of the barges, as you testified to previously, have been of assistance to persons on the Pennsylvanian in determining your course or position?

A. Well, the two white lights on barge No. 24 would perfectly line up with the hull of the Barry "K".

Q. Captain, there has been some question raised here as to the practice of towing barges through the bridges in Portland, that is, a vessel with two or three barges in tow would go through one side of the draw. Have you had that experience yourself? A. Yes, sir.

Q. And in pushing barges through the draws in Portland, what is the practice with regard to the speed at which you proceed?

(Testimony of Wm. A. Reed.)

A. Well, I would say when we have two barges, I would just get along at the ordinary rate, and if I had three, I would start and drift, and I have backed up to line up for them. It is pretty hard to get in position sometimes the way the bridges are located in the river.

Mr. Young: That is all.

Cross Examination

By Mr. Wood:

Q. Captain Reed, do you mean to testify now—I just want to see if I get your intent right—that the man on the bridge of the Pennsylvanian up here, which I think you said was 4,000 feet away from you at the first sight—is that what you said?
[712]

A. It was more than that.

Q. A mile?

A. A little better than a mile.

Q. A little better than a mile away. At that time they were a mile away and you said that you couldn't tell the relative position in the river of the Pennsylvanian from where you were, didn't you?

A. I said she was on the range.

Q. As it appeared to you? A. Yes.

Q. But you said you couldn't be certain of that, didn't you?

A. On the range and approximately about where I drew the cross.

Q. On your direct testimony, didn't you say that

(Testimony of Wm. A. Reed.)

she appeared to you to be on the range, but you couldn't—you thought so because that is the way they usually came, but you really couldn't tell which way she was, on the north—I mean the east or the west side?

A. Well, I said she was coming down on the range; I think that is my answer—wasn't it?

Q. I thought you said she appeared to you to be coming down the way they usually come, which is on the range, but that you couldn't tell her position in the river except her distance away from you.

A. I don't know whether I used those expressions or not.

Q. Isn't that a fact?

A. I don't remember. [713]

Q. I say, Isn't it a fact—never mind what you testified to before—when you saw her a mile away?

A. Yes, sir.

Q. You thought she was coming down on the range because that is the way they usually come; isn't that a fact?

A. That is the way they usually come, yes.

Q. And that is why you thought she was there; isn't that a fact?

A. Yes.

Q. But you couldn't tell in the darkness how much she was to the right or left in the river, could you?

A. I know approximately what distance they keep off that light up there.

Q. Yes. You know what they usually do?

A. Yes, sir.

(Testimony of Wm. A. Reed.)

Q. But you couldn't tell that night except from your knowledge of what they usually do where she was in the river, to the right or left, could you?

A. She looked just the same as they always did coming down there.

Q. I know, but just answer my question. You couldn't tell that, could you? You knew she was about a mile away from you; did you know whether she was on the range or to the left of the range or to the right of the range?

A. Not right on it, no; I couldn't tell.

Q. You couldn't tell that, no. All right. Now, I will ask you this: Do you want the Court to believe that the man up here [714] on the Pennsylvanian could look down the river a mile away, see your ship coming around the bend, and tell which side of the river you were on?

A. Yes, sir.

Q. Do you want the Court to believe that?

A. Absolutely.

Q. How would he tell?

A. I would be closer to Post Office Bar No. 3 than I would be to Post Office Lower, wouldn't I?

Q. I don't know. It would depend on how far down the river you were.

A. Well, according to my position on the chart that I checked.

Q. Yes, but do you think the man on the Pennsylvanian can tell, looking down at you, whether

(Testimony of Wm. A. Reed.)

you are this far up the river or that far up the river, or this far up the river?

A. I ain't saying what they can tell.

Q. I thought Mr. Young asked you whether a man in the position on the Pennsylvanian looking down couldn't tell where you were, to the right or left of the river?

A. I said they could.

Q. Now, I asked you why, how?

A. Because I would be closer to Post Office Bar No. 3 than I would to Post Office Lower right here.

Q. Where is Post Office Bar No. 3?

A. Right there. [715]

Q. Right there? A. Yes, sir.

Q. And is this Post Office Lower?

A. Yes, sir.

Q. What is the distance between them?

A. Well, twelve or thirteen hundred feet, I should judge.

Q. Well, it is pretty near fifteen hundred, if you want to measure it.

A. Well, that ain't a bad guess.

Q. Will you accept my statement that it is nearly fifteen hundred feet—it is over fourteen hundred feet from that light to that light?

Mr. Young: You might try measuring it.

Mr. Wood: Yes, I will be glad to. You measure it, Captain. There seems to be some disinclination to take my statement. Over there.

A. Is that about right?

Q. It seems to be, yes.

(Testimony of Wm. A. Reed.)

A. Is that the feet up there?

Mr. Young: Here.

A. (Continuing) I will have to get my glasses. It is right close to fifteen hundred feet.

Mr. Wood: Q. Yes. So is it your contention that a man on the Pennsylvanian seeing you a mile away, somewhere between lights that are fifteen hundred feet apart, can tell from that [716] fact which side of the river you are on?

A. Yes, sir.

Q. Now, you marked the place of collision right there where I am pointing, didn't you?

A. Yes, sir.

Q. Was that an accurate marking?

A. As near as I could tell when it was dark.

Q. How accurate was it?

A. Oh, I should judge it was near as I could tell.

Q. I know, but give us something better than that? A. I didn't make no soundings.

Q. Well, you have got a light right here to look at only a few hundred feet away from you; not over seven hundred feet away there is a light there, isn't there? I pointed to the wrong place, excuse me; right here, I mean. A. Yes, sir.

Q. Post Office Bar Lower? A. Rear.

Q. Rear, yes. A. That sets in the trees.

Q. That light was a whole lot closer to you than these lights were to that fellow up there, weren't they? A. Oh, yes.

(Testimony of Wm. A. Reed.)

Q. How close could you mark the place of collision?
A. As near as I did. [717]

Q. You knew the place of collision was going to be pretty important, didn't you?

A. Why sure. That is the reason I took observations.

Q. Yes, and you marked it as close as you could?

A. Yes, sir.

Q. How accurately have you marked it?

A. As near as I could.

Q. Well, how much might it vary from its actual position?

A. Oh, it wouldn't vary over fifty, I don't judge, fifty feet.

Q. That is within fifty feet, is it?

A. Something like that.

Q. All right. That is what I wanted to know.
Thanks.

Mr. Young: Just a moment, Captain. Take the stand.

Mr. Wood: Oh, no, I want to ask him something else on another subject.

Mr. Young: You had another question, did you say?

Mr. Wood: Yes.

Q. You testified about deck lights?

A. Yes, sir.

Q. On the Barry "K". I think the other witnesses, when they spoke of them, spoke of them as deck lights or cabin lights, house lights?

(Testimony of Wm. A. Reed.)

A. House lights.

Q. Were there any cabin lights showing from the windows of the Barry "K"? [718]

A. No, sir.

Q. What? A. No, sir.

Q. How about lights from the engine room of the Barry "K"?

A. They sit right up next to the ceiling and there is about eighteen inches of a hang-down on the house below those lights.

Q. I know, but the interior of the "Barry "K" is lighted, is it not? A. Yes, sir.

Q. It wasn't all dark, was it?

A. No, sir.

Q. It was light in the engine room, wasn't it?

A. Yes.

Q. The doors were partly open, weren't they?

A. I presume they were.

Q. So the illumination from that window would show out into the darkness, would it not?

A. It would not be a direct light.

Q. No, no; I know. But the illumination would show on a dark night, wouldn't it?

A. I presume it would.

Q. And the same about the windows from the house? A. What house?

Q. The cabins of the Barry "K"?

A. Yes, I suppose they would. Reflections, I would say. [719]

Q. Certainly, yes. You said you had applied

(Testimony of Wm. A. Reed.)

ten years ago to be a member of the Columbia River Pilots' Association but they had not taken you in?

A. No, sir.

Q. You do belong, however, to the same union that they belong to, do you not?

A. One of them.

Q. Local 17? A. Yes, sir.

Q. All the members of that Pilots' Association belong to Local 17, don't they?

A. I think they do.

Q. And all of the river men who have testified here on your side of the case belong to it, don't they? A. Yes, sir.

Q. In fact, you can't get in the Columbia River Pilots' Association nowadays unless you belong to union local 17, can you? A. I do not know.

The Court: Well, the converse is true; you can't get into the union unless you are a pilot either, can you?

Mr. Wood: Yes, you can get into the union. The union is broader than the Pilots' Association. It takes in river boat mates and men of that kind, does it not?

A. Yes, sir.

Mr. Young: Is that all, Mr. Wood?

Mr. Young: Yes. [720]

Redirect Examination

By Mr. Young:

Q. Captain Reed, how did the height of the deckhouse on barge No. 22 compare with the height

(Testimony of Wm. A. Reed.)

of the doors in the forward part of the Barry "K" at the point of the engine room; that is to say, were they lower or higher?

A. Well, the barges were higher.

Q. And what effect would that have upon the visibility to persons forward of the lights in the engine room?

A. You couldn't possibly see them.

Q. Couldn't possibly see them? A. No.

Q. Now, if at the time that the Barry "K" was first visible to the Pennsylvanian, the red light of the Barry "K" was visible to the Pennsylvanian, which side would that indicate was toward the Pennsylvanian? A. The port side.

Q. And would barge No. 24 then in any way interfere with the view which persons on the Pennsylvanian would have of any lights in the engine room? A. Yes, sir.

Q. Captain, at the time that this collision occurred, what was your judgment then as to the approximate distance that the Barry "K" was from the east shore at that point of time?

A. Oh, I would judge about six hundred feet.

[721]

Q. From the east shore, the Barry "K"?

A. Five to six hundred feet.

Q. Where did the collision occur with reference to the east shore of the river?

A. Oh, out about two hundred.

Q. Two hundred feet? A. Yes.

(Testimony of Wm. A. Reed.)

Q. And in placing a mark upon the map, was it your intention to place that at a point approximately two hundred feet from the east shore?

A. Yes, sir.

The Court: Q. What water do you think you were in?

A. Well, I figured I was in about twenty-one feet of water. That jumps up very quick there to about ten or twelve feet.

Mr. Young: Q. Do you know what the width of the river is where the depth is only ten or twelve feet, against the east shore?

A. I couldn't say.

Q. You don't know what that strip is, how wide it is? A. About 200 or a little less.

Mr. Wood: I don't think it is at all rebuttal, but I don't care if he wants to recall him.

Mr. Young: The question was simply prompted by a question put by the Court. That is all.

Recross Examination

By Mr. Wood: [722]

Q. Captain Reed, what were you referring to just now when you said that the Barry "K" was six hundred feet from the east shore at the time of the collision?

A. No, when I first seen the Pennsylvanian.

Q. Oh, no, that wasn't what he asked you.

A. I misunderstood the question.

Q. You said six hundred feet or five hundred feet?

(Testimony of Wm. A. Reed.)

A. I misunderstood the question then.

Q. What did you mean?

A. I understood him to ask *him* how far the Barry "K" was from the east shore when I first sighted the Pennsylvanian.

Mr. Wood: That is all.

Mr. Young: That is all, Captain.

(Witness excused.) [723]

E. P. WILLIAMS,

was recalled as a witness in rebuttal in behalf of the Libelant, and, having been previously sworn, testified further as follows:

Direct Examination

By Mr. Young:

Q. Captain Williams, at the time that this accident happened, state whether or not the Barry K was equipped with any deck lights or cabin lights.

A. No, sir; not any outside lights.

Q. Not any outside lights? A. No, sir.

Q. Were there any lights from the interior of the ship that you know of which were casting their rays out beyond the confines of the ship?

A. Well, there might have been a light, a dim light, showing out of the engine room, aft; that is, it possibly might show out, not bright.

Q. In view of the circumstances, that Barge 22 was on the nose of the Barry K, would that in any

(Testimony of E. P. Williams.)

way interfere with the view which persons on the Pennsylvanian would have of a light in the engine room?

A. Well, Barge 22 is straight ahead. They might have possibly saw a light being inside of the boat—that is, a slight reflection outside.

Q. The evidence from the Pennsylvanian, the men on the [724] Pennsylvanian's bridge, is to the effect that the first running light of the Barry K which they saw was the red light. That would mean that the port side was toward——

A. The port side; yes, sir.

Q. ——was toward the Pennsylvanian, was it not? A. Yes, sir.

Q. Would the position of the two barges on the forward nose of the Barry K and on the port side forward in any way interfere with this engine room light being visible to the Pennsylvanian?

A. If they saw a red light I do not think they would see any other lights on the Barry K, except her running lights.

Q. And by "running lights,"——

A. In that position.

Q. By "running lights," you mean which?

A. I mean the green lights, the red light on the port side, and the masthead lights over the pilot house.

Q. Captain, there has been some testimony on behalf of the Pennsylvanian that the men on the bridge, when they first saw the Barry K, were un-

(Testimony of E. P. Williams.)

able to determine the position which she occupied on the river with respect to whether it was toward the east or the west side. What would be your judgment as to whether there was a possibility of the Pennsylvanian's officers' determining the position of the Barry K at that time?

Mr. Wood: I object to that question. It is too broad. "Possibility." Of course, anything is possible. The question is, [725] what is reasonably probable, or something like that.

Mr. Young: There has been testimony on the part of the Pennsylvanian that since you did not have lighted a forward range light, that they could not determine the position of the Barry K, whether it was on the east or west side of the river.

Mr. Wood: That is not the position. We never made that contention. We have said that because of the lack of a forward range light we could not tell the angle of approach of the Barry K, or it might have that effect. I do not know whether it did or not.

Mr. Young: You are confining it to the angle of approach rather than the position on the east or west side. Is that right?

Mr. Wood: The testimony will have to speak for itself, but I will say, frankly, that I do not see how the presence or absence of a forward range light would help us or deter us from determining her position on the east or west side of the river. I do not see how it would have that effect.

(Testimony of E. P. Williams.)

Mr. Young: You do not think it would have anything to do with it. Very well. That narrows the issue.

Q. Captain, are there any other lights on either the east or west side of the river at or about this place which would have been of assistance to the men on the *Pennsylvanian* in helping them determine whether the *Barry K* was on the east or west side of the river?

A. Yes; if the vessel was up as far as Post Office Bar lights, [726] Post Office Bar Light No. 3, and the Lower Post Office Bar light on the west side, if she was up that far, between the lights.

Q. Well, the testimony by the *Pennsylvanian* is that they were just coming off Post Office Range at the time that they first observed the *Barry K*. Now, in that position, are there lights there along the river which would be of assistance to them in determining the position of the *Barry K*?

A. I will say if a vessel coming upstream was up near or abreast of either one of those lights, she could determine which one she was closer to, which side of the river she was on.

Q. Now, the evidence is that the *Barry K* was just below Post Office Bar 3 at the time that the *Pennsylvanian* was either on or just coming off the range in the positions indicated by these two marks.

A. Here is what I was referring to.

Q. Louder, so the reporter can get it.

(Testimony of E. P. Williams.)

A. I was referring to Lower Post Office light and this light, here.

Q. Post Office Bar 3? A. Yes, sir.

Q. Do I understand, then, that the Lower Post Office Bar light and Post Office Bar 3 light would be of assistance to the men on the *Pennsylvanian* in determining whether the *Barry K* was on the east or west side of the river?

A. If a vessel was coming upstream and they were close, anyways near abreast, it could be determined much easier than it could [727] if she was way below.

Q. Assume the *Barry K* is in the position indicated by this cross mark to which I am now pointing, and I am pointing to the mark "*Barry K* Reed 1st sight." Assume that is the position of the *Barry K* at the time that the *Pennsylvanian* is up in the position indicated by the other cross mark at the upper end of Post Office Range.

A. Well, I refer to this as to whether you were down here in position—I don't know where the *Pennsylvanian* was——

Q. Assume where I said, Captain.

A. Well, that is quite a ways.

Mr. Wood: Does your Honor want to see this? You cannot see it from where the witness it. Here is a pointer.

A. I couldn't say——

Mr. Wood: Maybe the Court would like to see it.

(Testimony of E. P. Williams.)

Mr. Young: Q. Can you run a straight edge now from the position of the Pennsylvanian, as indicated on the map, down to Post Office Bar Lower light?

A. No, sir. If the Pennsylvanian was up that far she couldn't judge the distances as to where the Barry K was as well as if she was down lower. I said if she was down this far on the range. The farther down she was, and if there was any vessel coming up, it would give her a better chance to get the distance.

Q. From the position indicated by the map, with the Pennsylvanian being as I am now indicating, could the men on the Pennsylvanian see Post Office Bar Lower? [728]

A. She is too far away.

Q. Too far away? A. I would say so.

Q. But as she gets farther down the range, then, as I understand, they can see that light?

A. Yes, sir.

Q. So that at a later point, there would come an opportunity for them to check the position of the Barry K with Post Office Lower light. Is that right? A. That is it.

Q. Would the same thing be true of the position of Post Office Bar 3 light?

A. If the vessel was coming down as she approached, if there was a vessel coming up, especially if she was between the lights, then she could de-

(Testimony of E. P. Williams.)

termine which one she was the closer to, or which side of the river she was on.

Mr. Young: That is all.

Cross Examination

By Mr. Wood:

Q. And if she is not between the lights, Captain,—just let the Court see. You keep the pointer. If the ship was further down the stream, she would appear to a vessel up here closer to this east light, would she not, than to this light?

A. Yes, sir; she would.

Q. And as she comes up the stream, her position changes in relation [729] to the two lights, and she appears to be more in the middle between them, does she not?

A. If she was coming up the middle river, she was——

Q. I mean her relation to the lights changes all the time as she comes up the river. A. Yes.

Mr. Wood: Certainly. That is all.

Redirect Examination

By Mr. Young:

Q. What is the purpose, Captain, of those lights, such as Post Office Bar 3 light and Post Office Bar Lower? A. They are as a guide.

Q. And what do you mean by “guide”?

A. To tell you how far off shore. You gauge your distance off the shore line.

Q. And to assist you in determining the distance other boats may be off the shore?

(Testimony of E. P. Williams.)

Mr. Wood: That is too leading, too suggestive.

Mr. Young: Q. What is the fact in that regard?

A. I say they are to guide you, the vessel, coming either direction, to determine your distance off the shore line. They are not a range light.

Mr. Young: That is all.

Mr. Wood: That is all, Captain.

(Witness excused.) [730]

Mr. Young: Those are all that I have here, your Honor, at this time.

The Court: The Federal statute that I refer to is 28 U. S. C. A., Section 695. You will find it in the pocket supplement enacted in 1936, and you should note these two decisions in the second circuit, very liberally applying the statute, one, 15 Federal 2d, 492, and one 17 Federal 2d, 387.

What other questions have been reserved that we might deal with at this time?

Mr. Wood: You say "What other questions?"—

The Court: Have been reserved that we might deal with at this time?

Mr. Wood: The question we are dealing with at this time—I am a little confused on that. You mean the transcript of the testimony from the Inspectors?

The Court: No. What other questions may we have reserved that we can——

Mr. Wood: Well, you reserved the question of whether the record before the Inspectors in this Barry K-Pennsylvanian collision was admissible.

The Court: Neither side offered it. You may have at my invitation, almost request. I do not want to put you in the wrong position on the record. You were not offering it on your own initiative, were you?

Mr. Wood: No, I did not. [731]

The Court: All right.

Mr. Wood: But I will offer——

The Court: At this stage I am not asking anything of you about it or suggesting anything of you about it. Is there anything you desire to do about it?

Mr. Wood: On my own initiative I would offer their final decision, not necessarily all of the testimony, but their decision in the case.

The Court: Well, in view of the United States Supreme Court decision 115 U. S., that has been produced, I feel that I must reject it, although that is contrary to practice, both in this court and Judge Fee's court.

Mr. Erskine B. Wood: Would not some more of these statutes, though, passed since that Supreme Court decision, make that admissible as a Government record? I think that is a Government record.

The Court: They might.

Mr. Erskine B. Wood: I think that Supreme Court case in 115 U. S. is considerably antedated.

The Court: Of course, generally, we do not consider anything binding more than 300 U. S.

Mr. Erskine B. Wood: I know a case to be argued over there. *He* admitted against me a doc-

tor's report, merely a doctor's opinion in writing, merely because he was consultant of the United States Public Health Service and he had written them a [732] long opinion, two or three pages, on the condition of the man, because that was a part of the United States Public Health records.

The Court: That grows out of the war risk decisions, a very broad rule that has been developed.

Mr. Erskine B. Wood: Although it was not a war risk case. I think he admitted.

The Court: As I am presently advised, in view of the decision in 115 U. S. I will reject the offer of the decision.

Mr. Wood: I am not renewing any argument. I merely want to make my position perfectly clear, because I value my position before the Court more than I do in any one case. I, myself, share Mr. Young's doubts as to whether this whole transcript of testimony is admissible in evidence except by way of impeachment. I think that may be right. I have offered it in the first instance really on your Honor's suggestion.

The Court: That is right.

Mr. Wood: And I also offered it as to any of my own witnesses who testified before the Inspectors and who were not here, like this third assistant engineer. I have told Mr. Young if he wants to use it for that purpose he can have it, or any such witnesses. But on the question of the final decision, I rather think that that is admissible, because I do not think pilots here in this river ought

to be put in the position of having the local Inspectors decide one way how that channel should be navigated, [733] and the Court, without knowing what their decision was, decide in some other. Now, I do not mean that that decision——

The Court: I know pretty well, after listening to both of you for six days, and I think the record will pretty near give me something to stand on, the statements that both of you have made, and your witnesses, as to what the decision was. It would be pretty hard to try this case without putting into the record what the decision was.

Mr. Wood: It is. And I want it for the sake of making my position clear in this and future cases also. I do not think their decision is binding on your Honor. I agree with Mr. Young on that. Your Honor could decide differently, but I think their decision is strongly advisory.

The Court: Well, you know how timid we are about precedents. We have the one precedent in Louisiana Federal District Court that was offered in the Chandler case by Messrs. Wood. They grounded it under the Federal documents rule, under the Federal statute as to public documents. Now, we have procecd through the industry of Mr. Maxwell, I have no doubt, the decision in 115 U. S., apparently a direct opinion.

(Mr. Erskine B. Wood nodded his head.)

The Court: I want the record to show that "Yes", it apparently is a direct opinion, as I may need his help at some later stage of this case. Now,

we have this decision in the Supreme Court of Louisiana in 1941 A. M. C. page 44, point 3, which Mr. Maxwell [734] produced, and you gentlemen have not had an opportunity to look at that. I have been looking at it during the morning and you have not had that chance. Hand it to them now, Mr. Maxwell.

Mr. Maxwell: Is that 1940?

The Court: 1941. Hand them the lower court decision. The lower court decision in 1940, A. M. C., page 1001, followed Judge Bond's decision. The Supreme Court of Louisiana reversed them without, however, I notice, commenting on Judge Borow's decision. Maybe one was a Long man and another an anti-Long man, and he did not feel like mentioning the name. Ordinarily you would expect him to. He makes some reference to the Federal Judge's decision. So that is the sum total of the precedents. I will see Judge Fee in the course of the day on other matters, and I am going to ask him again, as I have previously, what have been the precedents in his court on this point, Mr. Young and Mr. Wood, just to refresh my recollection as to what he has said about that. So I will make a further statement about it in the morning.

Now, we have a letter, here, I call it, a copy of the report that the pilot on the Pennsylvanian filed with the Inspectors, which you offered as a narrative, Mr. Wood, to supplement the Captain's testimony.

Mr. Wood: I did, and I also offered it today

again as confirming Captain Norberg's testimony that he had referred to that to refresh his memory on one point, and it changes the testimony he [735] first gave, a document used to refresh his recollection.

The Court: Now, do you persist in your objection to its introduction, Mr. Young?

Mr. Young: Yes, the document was not in any way used to refresh the recollection of the witness at the time that the document was offered. The witness testified of his——

The Court: Pardon me an interruption. You made a very good statement before as to your position. I think you had better look in the books if you deem that serious, between now and tomorrow. What has happened here is that the Captain has been called back and corrected his testimony.

Mr. Wood: Correct.

The Court: And Mr. Wood is offering now a report which the Captain made at the time, which is in line with the corrected testimony.

Mr. Wood: Right.

The Court: Now, you will find a discussion on that in Wigmore, I am sure as to whether the statement made at the time is admissible under those circumstances by way of explanation of how the inconsistency happened to develop and to strengthen the second and corrected testimony.

Mr. Young: Do I understand your Honor is speaking now in terms of *res gestae*?

The Court: No.

Mr. Young: I see. [736]

The Court: I am not going to have the time, and, I am pretty sure, the energy, to look that up, but you might do it if you want to. Ordinarily a man takes the stand, Mr. Wood, and tells his one story, just one story, and you ask him if he has a report in his pocket that he made, and you offer the report. We do not admit the report—we say it is self-serving—and he has been on the witness stand and told his story there; but I think you should think of this in terms of the special circumstances here present, Mr. Young. You may want, sometime, yourself, to back up a witness who has had to refresh himself—you not only try these cases for the occasion before us, but they make precedents, especially for a man with such a good memory as you have.

Mr. Young: I am glad to know that. I did not realize that I had such a good memory.

The Court: What else do we have around here?

Mr. Young: There is one matter that I omitted to ask Captain Williams when he was on the stand. I should like to recall him for just a moment.

Captain Williams.

E. P. WILLIAMS

was recalled in rebuttal as a witness in behalf of the Libelant, and, having been previously sworn, testified further as follows:

Further Direct Examination

By Mr. Young:

Q. Captain Williams, subsequent to February 1,

(Testimony of E. P. Williams.)

1941, when the [737] Barry K had her accident with the Pennsylvanian, how long did you continue to pilot boats for the Western Transportation Company, either act as pilot or Master?

A. Master about thirty days.

Q. About thirty days?

A. After that time.

Q. Now, during that period of time did you have occasion to go past Post Office Bar with any one of these three boats, the Barry K, the Claire, or the Patricia?

A. The Claire.

Q. The Claire? A. Yes, sir.

Q. Were you Master of the Claire at that time?

A. Master; yes, sir.

Q. And how many times did you go past Post Office Bar in that thirty-day period, would you say?

A. Well, we were by there twice each day. I would be on watch probably once.

Q. And state to the Court which side of the river you used in proceeding past Post Office Bar.

A. I used the east side of the river.

Q. That is the same as you had previously?

A. Yes, sir.

Q. Did you receive any instructions from anybody to make any change in the manner in which the boats should proceed past Post Office Bar following that accident? [738]

A. I received no instructions.

Mr. Young: That is all.

(Testimony of E. P. Williams.)

Cross Examination

By Mr. Wood:

Q. About half of the time you passed Post Office Bar in that thirty days, you were not on watch?

A. I was not on watch; no, sir.

Q. And half of the times that you were on watch you were going downstream, were you not?

A. Downstream and possibly it was late. I can't just recall. I might have been on watch coming in, possibly two or three times out of that period.

Q. You might have been on the west side coming in?

A. No, sir. I wouldn't have been on the west side.

Q. What did you say? You might have been what?

A. I might have been on watch. It might have come on my watch coming in.

Q. Are almost all of your watches going out?

A. On the Captain's watch, most all of them is going out.

Q. Going out, yes. So that really in that thirty days there would be few occasions where you, while on watch, would bring the vessel upstream?

A. Yes, there would be very few occasions.

Mr. Wood: That is all. [739]

Redirect Examination

By Mr. Young:

Q. Captain, during the time when you were not on watch, who would have been in the pilot house?

(Testimony of E. P. Williams.)

A. The pilot.

Q. I mean, what was his name?

A. Spencer, I believe it was, with me, and the balance of the time I was there.

Q. In other words, either you or Spencer would have been in the pilot house on all of those trips past Post Office Bar?

A. Yes, sir.

Mr. Young: That is all.

(Witness excused.)

Mr. Wood: To return to your Honor's discussion of what things were left in reserve, of course there is the matter of that engine room bell book, which I am not pressing. I do not care about it. Personally, I think it would probably make a more complete record of the case if it goes in.

Mr. Young: I am going to check the book, and if I have any different ideas in the morning I will advise you on it.

The Court: You might have Captain Hazelwood identify it now.

Mr. Wood: It is Captain Vaux.

The Court: What was that section number in 28 U. S. C. A. I [740] gave you?

Mr. Maxwell: 695 in the supplement, your Honor.

(The engine room bell book of the Pennsylvanian was marked Respondents' Exhibit 18 for identification.)

EARL B. VAUX

was recalled as a witness in behalf of the Respondents, and, having been previously sworn, testified further as follows:

Direct Examination

By Mr. Wood:

Q. I hand you this book that has just been marked by the reporter, and ask if you can identify it and say what it is. Look at it; look at the entries.

A. Yes, sir. I can identify it. It is the engine room log book of the Pennsylvanian.

The Court: Bell book?

A. Yes.

Mr. Wood: Q. It is not the engine room log book; it is the engine room bell book?

A. An error on my part. It is the engine room bell book; yes, sir.

Q. And what is the purpose of an engine room bell book?

A. It is to take all of the bells given from the bridge and their time is kept of the half-minute in the engine room.

Q. Are the entries made at the time? [741]

A. Yes, made right at the time; yes, sir.

Q. What is the practice? Does the man on watch obey the order and then make the entry, or what? A. Yes, sir.

The Court: Is this the engine room bell book that was in use at the time of the collision?

(Testimony of Earl B. Vaux.)

A. Yes, sir; it is. I called for that bell book at that time after the collision, and that is the bell book.

Mr. Wood: I offer in evidence page 25 of this bell book.

The Court: I will reserve ruling as to that until tomorrow morning when we hear further from Mr. Young.

Mr. Wood: Pardon me, your Honor. I should like this witness to put into the record an explanation of these symbols, or was that done?

The Court: The engine room bell book?

Mr. Wood: They use the same symbols.

The Court: The other one was explained on the stand.

Mr. Wood: There it is, if your Honor is satisfied to read it.

The Court: I am not interested in it at the present time. Mr. Young is the one that is wondering whether there is anything hurtful or helpful in it.

Mr. Wood: I wanted to show you the symbols. I am just avoiding having an incomplete record in the case. That is always distasteful. But, Captain, I want to ask you a question or two.

Q. It is customary on the Pennsylvanian as well as other boats [742] to make such a record in the engine room of bells at the time of receiving the signals from the bridge? A. Yes, sir.

Q. And who was on watch at that time?

(Testimony of Earl B. Vaux.)

A. Mr. Sairanen.

Q. Do you happen to know his handwriting?

A. I couldn't identify his handwriting; no, sir.

Q. Whom did you get the book from?

A. From the chief assistant engineer.

Q. Who was on watch at that time?

A. He was not on watch at the time, no, sir. Any orders I had to give, it is generally through the chief engineer or the first assistant, and they are carried out from there rather than going to the individual man to get it, and he will bring that bell book up or log or whatever it happens to be.

Q. And how soon after the accident did you get it?

A. Upon arrival and return to San Francisco, due to the fact that the engineers wanted that bell book, for times and moves from Portland after the accident, that is, to the dry dock and shifting around the dry dock and down to Astoria, and then at that time I picked it up and put it in my safe, and then put it upon request in the dock at San Francisco.

The Court: You may not want to question about it, Mr. Young.

Mr. Young: Only one question I did want to ask. In whose handwriting do these notations appear? [743]

Mr. Wood: I was going to ask something about that myself, if you will permit me.

A. I couldn't swear whose handwriting it is, sir. I was told when I asked that it was Sairanen's.

(Testimony of Earl B. Vaux.)

Mr. Young: When you asked whom?

A. The first assistant.

Mr. Young: You do not know this handwriting, yourself?

A. I would not swear to it; no, sir.

Mr. Wood: Q. Captain, the engineer on watch is assisted by an oiler, is he not?

A. He is assisted by an oiler.

Q. So there are always two men there in the engine room at the time? A. Yes, sir.

Q. Well, it is not clear to me—does the engineer make these entries in the bell book, or does the oiler make them?

A. I couldn't be positive on that, myself.

Q. I thought it was the practice for the engineer to tend the throttle and so on, and the oiler to note them in the bell book.

A. It is a general practice; yes, sir.

Q. If that was so, then these entries would not be in Sairanen's handwriting, if he were handling the throttle? A. Presumably not.

Mr. Wood: That is all.

Mr. Young: No further questions at this time, your Honor.

(Witness excused.) [744]

The Court: You have nine witnesses tomorrow.

Mr. Young: It will be eight. One of them has been on the stand.

The Court: To examine briefly just as you did the Captain?

Mr. Young: Yes, your Honor. It is in regard to this matter as to what the practice has been since the accident.

The Court: You should get through with that in fifteen or twenty minutes.

Mr. Young: I should think so, yes.

The Court: I should think we could start at nine and finish the argument about noon. Now, as to the argument, there is nothing that has not been discussed pretty fully today and preceding days. The lights have been discussed pretty fully today.

Mr. Wood: Yes.

The Court: Your theories of custom have been discussed pretty fully, Mr. Young, by you. I do not mind hearing you again, but I am just running over the things that we have already covered pretty fully. Is either side going to want to brief the case after the argument? I will not decide it at the end of the argument. I will say that now.

Mr. Wood: That would depend on your Honor's wish.

Mr. Young: I think in this case it would be helpful to your Honor if we did submit briefs. We might take the word "brief" seriously. That is something lawyers do not ordinarily do, but if the word "brief" is taken seriously and a comparatively short memorandum filed, I think it would be an assistance to your Honor. [745]

Mr. Wood: We might submit a memorandum of authorities or something like that.

Mr. Young: May I inquire as to whether your Honor will expect to rule on these matters that are still up in the air prior to the time that we make our arguments?

The Court: What are they.

Mr. Young: The matter of the introduction of the transcript is one point.

The Court: Which transcript?

Mr. Young: The transcript of the proceedings before the local Inspector.

The Court: Yes.

Mr. Young: That is the most important matter, I think, that your Honor has not passed on.

The Court: As present advised, I am going to exclude it now. Now, what else?

Mr. Young: That was the main point I had in mind.

The Court: The transcript of what, do you mean?

Mr. Young: The transcript of the proceedings before the——

The Court: The evidence, or the transcript of the findings?

Mr. Young: Well, all, the whole thing. I understood your Honor had definitely ruled with regard to the findings, that you have now ruled those out. That would leave, of course, the balance of the transcript which consists of testimony and colloquy back and forth between—— [746]

The Court: Consider the evidence out.

Mr. Young: Consider the evidence out?

The Court: Yes. Now, unless something further is urged on me about the decision in the morning I will exclude that——

Mr. Young: I understand.

The Court: ——unless my talk with Judge Fee as to the prior practice in his court as well as mine here should cause me to change my mind. I shall have that talk with him during the day. Now, what else besides that?

Mr. Young: I do not think of anything further, as far as matters of rulings are concerned, at this time.

The Court: I might ask you, Mr. Young, what points you expect to dwell on in your argument tomorrow. Could you not just state them as points now?

Mr. Young: I would rather not be bound by what I would say today as to the precise scope, because one point I had in mind in asking your Honor was that I might give myself a little additional time to graft together all of the various threads of the evidence. Naturally, we will discuss the questions of custom and the matter of lights and the matter of last clear chance and negligence of the pilot of the Pennsylvanian.

The Court: Rather to my surprise there is nothing said about divided damages in the case.

Mr. Young: It is stipulated that that would not be determined, nothing introduced at this time, your Honor. [747]

The Court: Oh, no. That is not what I mean.

I did not say the amount of damages. I said the doctrine of divided damages, whether or not this is a case to be considered on the basis of possibly dividing the damages in some proportion. I say it again: rather to my surprise it has not been suggested as an alternative position as it usually is in these admiralty cases by either side. In other words, this appears to be a fight to the death, whole hog or none, of one side or the other prevailing.

Mr. Young: That is certainly the impression that one would gain from examining the pleadings, I should say, your Honor. As to what your Honor does with the case, of course, that is something else.

The Court: There are cases, I suppose, where fault has not been found on either side.

Mr. Young: Well, as I understand the law, your Honor, on the point, there are four possible decisions in an admiralty case, where there is a libel and a cross libel. One of them is that neither recovers from the other, due to the fact that there is no fault found either way. The other is that libelant recovers in full from respondent. The other is respondent recovers in full from libelant, and the final possibility is that it is a case of mutual fault where the damages are lumped together and split fifty-fifty.

The Court: Oh, fifty-fifty.

Mr. Young: Those are the only possibilities that I know [748] anything about.

The Court: Is this a fifty-fifty case?

Mr. Young: That is for your Honor to determine.

The Court: Wait a minute now. You said "fifty-fifty." If this were deemed to be an apportionment of damages case, it would be fifty-fifty. Is that one the only possible proportion?

Mr. Wood: Are you asking me?

The Court: Anybody that will answer.

Mr. Wood: I think in a proportionment of damages, the usual rule is, divide them equally, but there have been exceptions to it, and in cases of tugs and tows, they divide it into thirds and fourths.

Mr. Young: Well, counsel is referring, I think, to cases where there are more than two parties involved. If there were three parties involved you might have that situation. I think the law on that point is under the European rule, as decided by a conference, held in 1910. It was determined that in an admiralty case the Court was at liberty to divide up the damages in any way that it saw fit. The American courts, however, have not followed the European rule, but, as I have understood, have confined their holdings to the rule that if the libellant does not recover in full from the respondent, or respondent in full from the libellant, then recovery of all the damages are simply split fifty-fifty.

The Court: Is that right, from your point of view?

Mr. Erskine B. Wood: Not just entirely. The damages, as I [749] understand it, your Honor, are divided equally among the number of vessels at

fault, if there is more than one vessel at fault. It is fifty-fifty where there are two vessels, but if three vessels are at fault it would be thrity-three and a third apiece. If four vessels are at fault it would be twenty-five per cent apiece; and of course where you have a tug and tow the various members of the tow are considered as a separate vessel. That is pretty well settled. If they are at fault, as individual vessels, why you might get it a division of damages into more than two parts, if all were at fault.

The Court: You would say there were four vessels to be thought of in this case, two tows and a tow boat and a steamer?

Mr. Erskine B. Wood: Yes, there were really four vessels involved in this collision.

Mr. Young: I make my next statement, your Honor, subject to further check between now and tomorrow, but it is my understanding that the rule about division on a basis other than fifty-fifty is dependent upon there being more than two separate, distinct vessels involved. I take it the Barry K—I had assumed it would be treated as one vessel,—that is, those two boats that were with the Barry K, whatever they are, barges, scows, or lighters, all add up together into one boat. However, counsel having made that statement, I want to check its accuracy.

The Court: Then we will adjourn until 9 o'clock in the morning.

(Thereupon, at 11:35 A. M., Court was [750] adjourned until tomorrow, Wednesday, July 23, 1941, 9 o'clock A. M.) [751]

Wednesday, July 23, 1941, at 9 o'clock A. M., pursuant to adjournment, the following proceedings were had:

Mr. Young: I should like the record to show that I am now supplying the court reporter with a copy of the transcript of the testimony of Wayne Swearengen, which was read to your Honor yesterday. He was the lookout on board the Pennsylvanian.

Mr. Wood: That has been checked with the transcript of the Inspectors' record.

Mr. Young: Yes, the girl at the office did that. I should be glad to have you check it also.

Mr. Wood: I will check it later.

ARTHUR WILLIAM FIDLER,

produced as a witness in behalf of the Libelant in rebuttal, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. What is your occupation, please?

A. I am a river Captain, marine Captain.

Q. And what license do you carry?

A. Captain and a pilot also.

Q. In what waters?

A. Columbia River and the Willamette as far as Oregon City and [752] the Columbia as far as Cascade Locks.

Q. And how long last past have you held those licenses?

(Testimony of Arthur William Fidler.)

A. I have held them for twenty-two years.

Q. Are you at the present time in the employ of the Western Transportation Company?

A. Yes, sir; I am.

Q. In the capacity of Captain?

A. Yes, sir.

Q. And how long have you held that position with that company?

A. Twenty-one years and a half.

Q. Captain, I will ask you to state whether or not since February 1 of this year you have been Captain of the Barry K at any time?

A. Yes, sir; I have.

Q. Have you also been Captain of the Claire?

A. Yes, sir; I have, and at present am.

Q. And have you had anything to do with the boat called the Patricia?

A. I haven't been on the Patricia.

Q. Not since February 1? A. No, sir.

Q. Are you familiar with Post Office Bar?

A. Very familiar. I have had occasions to pass there very often.

Q. Will you state whether or not since February 1 of this year what has been the practice of yourself in operating either the Barry K or the Claire past Post Office Bar with respect to the side of the river which you followed? [753]

A. Well, in entering the mouth of the river I keep to the Post Office Bar side, which is the starboard side, and leave the deep-water ships have the starboard side, the left-hand side coming out.

(Testimony of Arthur William Fidler.)

Q. Is that true in going downstream also?

A. I keep to the right-hand side going out and leave them have the right.

Q. And has that practice been continuous by you since February 1 of this year?

A. It has always been my practice, before and after.

Q. Both before and after.

Mr. Young: You may cross examine.

Cross Examination

By Mr. Wood:

Q. Do you pay any attention to whistle signals passing steamers there, Captain? A. Yes, sir.

Q. Why do you, if you are going to pass up on the shoal water side regardless?

A. Well, we blow our signal and it is answered and it is understood. When a signal is given and answered and understood we proceed to pass on the side.

Q. You do pay attention to whistle signals, then, do you not? A. Certainly do.

Q. In the daytime do you not only listen for the signals but watch for the steam blasts? [754]

A. Yes, sir.

Q. What?

A. Some of them are not steam. Considerable of the ships is the air whistles. You don't see any steam.

Q. Yes, I know, but it is the practice of careful

(Testimony of Arthur William Fidler.)

navigators, is it not, to watch for the steam blasts of the whistle of an approaching steamer?

A. They either watch for the steam or the sound of the whistle. We are always alert when we are passing ship.

Q. I say you are not only listening for the sound but you are watching for the steam blasts, are you not?

A. Yes, sir.

Q. Why do you do that?

A. Well, it is just natural for you to stand there and watch an approaching ship.

Q. Have you any reason for watching for the steam blasts?

A. Sometimes if there is any disturbance of noise or anything, if you see the steam from the whistles you can detect whether they have blowed one or two.

Q. In other words, you watch for the steam blasts as an additional way to tell whether the whistle of the other ship is blowing one blast or two blasts, do you not?

A. Yes, sir.

Mr. Wood: That is all.

The Court: Step down, Captain. [755]

Mr. Young: That is all, Captain.

(Witness excused.)

Mr. Young: Captain Stover, please.

THEODORE STOVER,

produced as a witness in behalf of the Libelant in rebuttal, being first duly sworn, testified as follows:

The Court: Mr. Wood might stipulate with you that, if called, these employes of the Libelant would also testify the same as the one that has just been on the stand.

Mr. Wood: How many of them are there?

Mr. Young: There are seven, I think, altogether, your Honor.

Mr. Wood: I do not think I can do that yet, your Honor.

Mr. Young: I will make them as short as possible, your Honor.

Direct Examination

By Mr. Young:

Q. State your occupation, please.

A. Pilot on the Columbia and Willamette rivers.

Q. And what license do you carry?

A. Master mate and pilot.

Q. Covering the Willamette and Columbia rivers?

A. Willamette and Columbia rivers. [756]

Q. And for river boats?

A. Yes, sir. To one thousand gross tons.

Q. How long have you held those licenses?

A. Six years, a little better.

(Testimony of Theodore Stover.)

Q. Are you at the present time in the employ of the Western Transportation Company?

A. Yes, sir.

Q. In what capacity? A. Pilot.

Q. How long have you been with that company? A. Thirteen years.

Q. In connection with your work for the Western Transportation Company, have you had occasion to pilot boats up and down the river past Post Office Bar? A. Yes.

Q. Captain, since February 1 of this year, have you piloted the steamer Claire at any time?

A. Yes, I have.

Q. And have you piloted the steamer Barry K at any time? A. Yes, I have.

Q. Have you piloted the Patricia at any time since February 1? A. No, I haven't.

Q. Since February 1 of this year will you state what has been your practice with regard to the side of the river which you follow in passing Post Office Bar with either the Barry K or the Claire?

[757]

A. I have made it a practice to keep on the east side of the river there, which is the left-hand side coming in and the right-hand side coming out.

Q. And that is whether you are going upstream or downstream? A. Yes, sir.

Q. Has there been any change in your practice in that regard since February 1 of this year as compared with prior to February 1?

(Testimony of Theodore Stover.)

A. No, there hasn't.

Mr. Young: Cross examine.

Cross Examination

By Mr. Wood:

Q. Have you known of the decision that the local Inspectors made in the case of Captain Reed growing out of this collision?

A. No, I don't know yet what decision they made.

Q. But you have just kept on coming up the east side?

A. Yes.

Q. Regardless of what that decision was?

A. Yes, sir.

Q. Do you pay any attention to whistle signals, passing steamers, there?

A. Yes, I do.

Q. Do you watch for their steam blasts as well as listen to them?

A. Yes, I watch for the steam blasts. If I am not sure if one or two blasts is blown, whichever they blow, I don't answer until it is properly understood what is blown. [758]

Q. And watching for the steam blasts helps you understand what the whistle has been?

A. Yes, sir.

Mr. Wood: That is all.

Mr. Young: That is all.

(Witness excused.)

Mr. Young: Captain Spencer.

LANSING H. SPENCER

produced as a witness in behalf of the Libelant in rebuttal, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. What is your occupation, please?

A. Well, I am ten-day skipper and ten-day pilot.

Q. Employed by whom?

A. Western Transportation Company.

Q. How long have you been in that Company's employ?

A. Since the first day of March, 1933.

Q. And what licenses do you carry?

A. Master and pilot unlimited.

Q. In what waters?

A. Columbia River and tributaries. [759]

Q. How long have you held those licenses?

A. Since 1930.

Q. Captain, I will ask you to state whether or not since February 1 of this year you have been the pilot or Master of the steamer Barry K.

A. Yes, sir.

Q. And have you been the pilot or Master of the steamer Claire? A. Yes, sir.

Q. Have you been the pilot or Master of the Patricia? A. No.

Q. Since February 1 of this year have you had occasion to go down on Post Office Bar with either the Barry K or the Claire? A. Yes, sir.

(Testimony of Lansing H. Spencer.)

Q. You are familiar with that territory?

A. Yes. That is our daily run.

Q. Pardon? A. That is our daily run.

Q. Daily run. Will you state whether or not, during the time that you have gone over or past Post Office Bar since February 1 of this year, what has been your practice with regard to the side of the river that you follow at that point?

A. Well, we always keep the east bank.

Q. That is true going up and downstream?

A. Right.

Q. And has that been your continuous practice since February 1 of this year? [760]

A. That always has been.

Q. There has been no change in your practice since February 1, as distinguished from prior to February 1? A. No.

Mr. Young: You may cross examine.

Cross Examination

By Mr. Wood:

Q. Do you pay any attention to whistle signals of approaching steamers there? A. Yes, sir.

Q. You do? A. Yes, sir.

Q. Suppose a steamer blows you a one blast. What do you do?

A. Well, it depends on the condition of the place we are in. If he blows us one whistle, we will probably—the only thing we can do is blow him down and blow him the danger signal if we are over to that side of the bank of the river.

(Testimony of Lansing H. Spencer.)

Q. You mean you insist on staying on what I will call the wrong side, regardless of what whistle you give?

Mr. Young: I object to that question, your Honor, as being argumentative.

Mr. Wood: I said what I thought.

The Court: Change it to read "on the east side."

Mr. Wood: East side.

Q. You insist on staying on the east side no matter what whistle [761] you get from another ship?

A. We never got any other whistle outside of á starboard whistle, two whistles. That is a standing rule amongst us.

Q. Amongst you? A. Yes, sir.

Q. You never blow anything but what kind of a whistle there?

A. Starboard whistle, which is two long blasts of the whistle.

Q. And if a steamer blows you one blast, you insist on going ahead on two blasts, do you?

A. I blow him a danger signal and then blow him two blasts, because I am over so far to the east side of the bank it would be impossible to pass me on the port side.

Q. You are over so far when you enter that place, according to your practice, that you cannot get over on the right-hand side. Is that what you mean?

A. No, we can get over there all right, but we

(Testimony of Lansing H. Spencer.)

are right in the bend and we have to be coming out of the bend to clear ourselves, which the ship coming down there would have to throw their stern into the bend on us. They are bound to throw us into the bank there.

Mr. Wood: All right. That is all.

Redirect Examination

By Mr. Young:

Q. Do you remember ever receiving——

The Court: He said he did not. He covered that.

[762]

Mr. Young: I wanted to ask him specifically with regard to ocean-going steamers, your Honor, as distinguished from other vessels.

Q. The whistles you always expect to receive at that point are what? A. Two whistles.

Q. And has that been your experience that you have always received whistles of that sort?

A. Yes.

Q. Irrespective of whether they are ocean ships or otherwise? A. Yes; right.

Mr. Young: That is all.

(Witness excused.)

RALPH R. ROSS

produced as a witness in behalf of the Libelant in rebuttal, being first duly sworn, testified as follows:

Mr. Young: If the Court please, the first two

(Testimony of Ralph R. Ross.)

witnesses who were just on the stand, I took the liberty of excusing. They were required to go back to their ship. I assume that meets with your Honor's approval.

Direct Examination

By Mr. Young:

Q. What is your occupation, please?

A. Pilot, Columbia River. [763]

Q. And by whom are you employed?

A. Western Transportation.

Q. How long have you been with that company?

A. About eight years.

Q. As a pilot?

A. No, as pilot about two years.

Q. What license do you carry?

A. Master and pilot, Columbia River and Willamette.

Q. And how long have you held that license?

A. About two and a half years.

Q. I will ask you to state whether or not since February 1 of this year you had occasion to act as pilot or Master of the Barry K. A. Yes.

Q. Have you had occasion to act as pilot or Master since February 1 of the Claire? A. No.

Q. Since February 1 have you had occasion to act as pilot or Master of the Patricia?

A. Yes.

Q. Since February 1 have you had occasion to operate either the Barry K or the Patricia past Post Office Bar? A. Both; yes, sir.

(Testimony of Ralph R. Ross.)

Q. Both vessels. Since February 1, what has been your practice with regard to the side of the stream that you follow in passing Post Office Bar? [764]

A. There has been no change.

Q. Which side do you follow?

A. We always use the west bank.

Q. Always what?

A. Always use the east bank.

Q. You said "west," I think, a moment ago. Did you? Was that my mistake?

A. Yes, that was in error.

Q. You have used the east bank?

A. The east bank, yes.

Q. And is that the same practice that you followed prior to February 1? A. Yes, the same.

Q. Are you acquainted with a pilot or Master employed by the Western Transportation Company by the name of Beckett? A. Yes.

Q. And has he been with you on either of the trips that you have made with the Barry K or the Patricia? A. Yes, he has.

Q. He has been your——

A. He was Master and I was the pilot.

Q. He was Master and you were the pilot?

A. Yes.

Q. To your knowledge at any time while he was on watch did either the Barry K or the Patricia follow any course except the east side [765] of the river past Post Office Bar?

Mr. Wood: I object to that question as imma-

(Testimony of Ralph R. Ross.)

terial when it is qualified to his knowledge. This man was probably asleep while the Master was navigating the ship.

Mr. Young: Qualify the question to his knowledge?

A. To my knowledge he always followed the east bank.

Mr. Wood: What do you mean by your knowledge?

A. Any time I was up and he was on watch.

Mr. Wood: Part of the time he was navigating the vessel while you were asleep, was he?

A. Yes.

Mr. Wood: That is all.

The Court: Step down.

Mr. Young: That is all, Captain.

(Witness excused.)

LEWIS H. GILDEZ,

produced as a witness in behalf of the Libelant in rebuttal, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. What is your occupation, please?

A. Master and pilot.

Q. And in whose employ? [766]

A. Western Transportation.

Q. How long have you been with that company?

(Testimony of Lewis H. Gildez.)

A. About eighteen years.

Q. In what capacity?

A. As Master and pilot.

Q. What licenses do you carry?

A. Master and pilot.

Q. In what territory?

A. Columbia River and tributaries.

Q. Since February 1 of this year have you had occasion to pilot or act as Master of the Barry K?

A. No, sir.

Q. Or of the Claire? A. No, sir.

Q. Or of the Patricia? A. Yes, sir.

Q. Have you had occasion to proceed past Post Office Bar in either direction since February 1 of this year? A. Yes, sir.

Q. During that period of time what has been your practice with regard to the side of the river on which you have proceeded?

A. Travelled on the east side.

Q. At Post Office Bar?

A. The east side of the river.

Q. Is that true both going upstream and downstream? [767] A. Yes, sir.

Q. Has there been any change in your practice in that regard since February 1 of this year as compared with the period before February 1?

A. No, sir.

Q. Are you acquainted with a pilot or Master in the employ of the Western Transportation Company by the name of Beckett? A. Yes, sir.

(Testimony of Lewis H. Gildez.)

Q. Was he with you on any of these trips that you made since February 1?

A. On the Patricia.

Q. On the Patricia? A. Yes, sir.

Q. Since February 1? A. Yes, sir.

Q. Now, at times when he was on watch, to your knowledge, what has been his practice with regard to the matter of which side of the stream at Post Office Bar the Patricia would follow?

A. On the east side, to my knowledge.

Mr. Young: You may cross examine.

Cross Examination

By Mr. Wood:

Q. You have no real knowledge of it, have you?

A. I have seen him do it once or twice.

Q. And you also have been off watch and probably asleep at other [768] times when he was navigating the ship, have you not? A. Yes, sir.

Q. Did you pay any attention to whistles going through Post Office Bar channel?

A. Yes, sir.

Q. Why do you, if you are always going to pass on the left-hand side? A. The law says so.

Q. The law says you shall keep to the right-hand side, does it not?

A. It says if you blow two whistles you can take the other side, though.

Q. That is your interpretation of the law?

A. That is what it says in the book.

(Testimony of Lewis H. Gildez.)

Q. I think it does not, but all right. I will dismiss you.

Mr. Wood: That is all.

Mr. Young: That is all.

(Witness excused.)

ELBERT DAVIS,

produced as a witness in behalf of the Libelant in rebuttal, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. State your occupation, please.

A. River pilot. [769]

Q. Employed by whom?

A. Western Transportation Company.

Q. How long have you been with that company?

A. Been employed there November, 1939.

Q. What licenses do you carry?

A. Master and pilot.

Q. What waters?

A. Columbia and Willamette River; also Snake River.

Q. And how long have you held that license?

A. Fourteen years.

Q. Captain, have you had occasion since February 1 of this year to pilot or act as Master of the Barry K past Post Office Bar in the Willamette River?

A. No.

(Testimony of Elbert Davis.)

Q. I will ask the same question with respect to the Claire. A. No.

Q. And the same question with respect to the Patricia. A. Yes.

Q. In operating the Patricia past Post Office Bar since February 1 of this year, which side of the stream have you followed?

A. The east side.

Q. And has that been your continuous practice since February 1? A. Yes, sir.

Q. Has there been any difference in your practice since February 1 and that which existed prior to February 1? [770] A. No, sir.

Mr. Young: You may cross examine.

Cross Examination

By Mr. Wood:

Q. Were you aware of the decision that the local Inspectors made in Captain Reed's case?

A. No, I know nothing about that decision.

Q. Your company never even informed you of it? A. No, sir.

Mr. Wood: That is all.

Mr. Young: That is all.

(Witness excused.)

REUBEN W. CONFER,

produced as a witness in behalf of the Libelant in rebuttal, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. State your name, please.

A. Reuben Warren Confer.

Q. Just be seated. And where do you live?

A. Oswego; Oswego, Oregon.

Q. What is your occupation?

A. Operating manager for the Western Transportation Company. [771]

Q. Your office is in Portland?

A. That is right.

Q. And how long have you been with that company?

A. Well, I have been twelve years as the operating manager, but I have been with the paper company all my working days, as a matter of fact.

Q. How many years would that be?

A. Twenty-seven years.

Q. The twelve-year period to which you refer is the period last past?

A. That is right; with the Western Transportation as operating manager.

Q. As operating manager for the Western Transportation Company would you be the one to give any instructions to your masters or pilots, if any were to be given, with regard to the manner in which they should operate your boats past Post

(Testimony of Reuben W. Confer.)

Office Bar? I refer to the side of the river on which they should proceed.

A. If there were any such orders to be issued from our company, the Western Transportation Company, they would come through my department.

Q. And you would have knowledge of them yourself?

A. I would have personal knowledge of them myself.

Q. Yes. Now, state whether or not since February 1 of 1941 any such order or instruction has passed through your department with regard to the side of the river on which your boats should proceed [772] in passing Post Office Bar.

A. Absolutely none whatsoever.

Q. Now, are you a captain?

A. No, sir; I am not.

Q. Mr. Confer, you have been in the court room while a number of witnesses have testified on behalf of Western Transportation Company, have you not? A. Yes, sir.

Q. Now, will you state whether or not there have appeared on the witness stand this morning all of the pilots or masters of the Western Transportation Company who have either piloted or been masters of the Barry K, Claire, or Patricia since February 1 of this year?

A. All with the exception of one.

Q. And who is that?

A. Captain Beckett.

(Testimony of Reuben W. Confer.)

Q. And which one of the boats was he on subsequent to the first of the year? Do you remember?

A. Well, he has been on the *Patricia*, the *Barry K*, and the *Burton*, if you wish to——

Q. Yes, I am not interested in the *Burton*. He has not been on the *Claire*? A. No, sir.

Q. You have personal knowledge of the boats on which these various captains and pilots are stationed. Is that correct? [773]

A. That is correct.

Q. Where is Captain Beckett at the present time?

A. Captain Beckett at the present time, his family informs me, is at—up at Coulee Dam, or Soap Lake, some place.

Q. Up in Northern Washington?

A. He is off on his leave of absence, and he is away.

Q. Mr. Confer, to your knowledge have any of your boats in passing Post Office Bar used the west instead of the east side of the river?

A. Not to my knowledge.

Mr. Young: That is all.

Cross Examination

By Mr. Wood:

Q. Mr. Confer, I assume as a matter of course you knew of the action taken by the local Inspectors in the matter of Captain Reed growing out of this collision, did you not?

A. That is quite true.

(Testimony of Reuben W. Confer.)

Q. Did you attend that investigation?

A. No, sir; I did not.

Q. You had Mr. Young attend it?

A. I am not positive on that, even. I rather think so.

Q. At any rate, you knew the result, you were informed of the result?

A. I was informed of the result, yes.

Q. But notwithstanding that, you took no action of any kind in [774] the way of issuing any instructions to your masters?

A. (The witness shook his head "No.")

Q. You shake your head.

A. No, sir.

Mr. Wood: That is all. Thank you.

Mr. Young: That is all.

(Witness excused.)

Mr. Young: If the Court please, yesterday when your Honor was inquiring as to how many witnesses I had I was thinking in terms of just the witnesses who would be testifying to the subject matter that you have heard. I do wish to call two experts for just short questions.

Mr. Wood: Is this rebuttal?

Mr. Young: Yes, this is rebuttal.

Captain Graham.

ORWIN G. GRAHAM,

produced as a witness in behalf of the Libelant in rebuttal, being first duly sworn, testified as follows :

Direct Examination

By Mr. Young :

Q. Where do you live, please ?

A. Portland. [775]

Q. And what is your occupation ?

A. Columbia River pilot.

Q. How long have you done that work ?

A. A little over thirteen years.

Q. And what licenses do you carry ?

A. Master and pilot's license.

Q. On what type of vessel ?

A. Unlimited license.

Q. And does this include the Columbia and Willamette rivers ?

A. Yes, sir. The Willamette as far as Oswego and the Columbia as far as Cape Horn and Astoria.

Q. Does that also include the piloting of ocean-going ships ? A. Yes, sir.

Q. Is your work at present confined to the piloting of ocean-going ships ? A. Yes, sir.

Q. And how long has it been so confined ?

A. A little over thirteen years.

Q. And you have been doing that work in the Willamette and Columbia rivers ?

A. Yes, sir.

Q. Captain, I will ask you to state whether or

(Testimony of Orwin G. Graham.)

not you know of any custom on any ocean-going ships which are being operated in or out of this port that the pilot upon hearing a whistle signal will confer with other officers on the bridge as to the identity [776] of that signal?

A. No, I do not.

Q. You know of no such custom?

A. No, sir.

Q. To what extent, if at all, do the pilots ever confer in your experience with other officers on the bridge about signals?

A. Well, occasionally why the mate will say that the ship blowed one or two whistles, but it isn't a common practice, but it is done occasionally.

Q. In event of some uncertainty on your part as pilot, what would you do then as to the identity of the whistles?

Mr. Wood: It is immaterial. I object to that. It is immaterial——

Mr. Young: Strike the question.

Q. Captain Graham, what is the practice with respect to whether or not ocean-going ships which are being piloted down the Willamette River to the Columbia customarily have on the forecastle head someone who is in charge of dropping anchors?

Mr. Wood: If your Honor please, that is not rebuttal. He did not go into that matter of anchors on his case in chief at all. He did not charge it in the libel. He did not ask one of his witnesses about it. He waited until some of our witnesses got

(Testimony of Orwin G. Graham.)

on the stand and then he simply asked if anybody was on there to drop anchors. That is not an issue in this case.

Mr. Young: If the Court please, that matter was discussed at [777] the time the questions were asked, and I thought we had the matter threshed out. The fact of the matter is, the libel charges that the *Pennsylvanian* did not slow down or did not stop, and when this question arose once before, as I pointed out, the matter of the use of anchors was simply one of the incidents in connection with the slowing down or stopping of the vessel, and your Honor permitted the testimony at that particular time, and it has been my understanding that it is definitely within the issues of this case. Obviously the question as to what was done on board the *Pennsylvanian* is a matter which was within the knowledge of the *Pennsylvanian* people rather than our own, and therefore the logical time for the specific questions in that regard to be asked arose at the time of the *Pennsylvanian*'s witnesses being on the stand.

The Court: He may answer.

Mr. Young: Read the question.

The Court: No. Just answer it. What is the custom about anchors?

Mr. Young: Q. Do you have the question in mind, Captain?

A. It is the general custom to keep a carpenter or a man capable of dropping the anchor until we get to the mouth of the Willamette.

(Testimony of Orwin G. Graham.)

Q. Is an ordinary seaman ordinarily regarded as being a person who is capable of dropping the anchors?

A. I can't recall ever of an ordinary seaman dropping an anchor.

Q. Captain, have you ever been a pilot on board the steamer [778] *Pennsylvanian* of the American-Hawaiian line?

A. Well, now, I was American-Hawaiian pilot. You understand that when the Columbia River pilots were doing their work, they had a certain number of men out of our group that piloted the American-Hawaiian—they didn't all handle them—and I was one of the American-Hawaiian pilots, to the best of my knowledge, for three or four years.

Q. And during what period was that?

A. Well, now, that I just can't recall. I would say perhaps four or five years back from the present date that they put on their own pilots.

Q. And do you remember whether or not you had occasion to pilot the *Pennsylvanian* at any time?

A. To the best of my knowledge I have, yes.

Q. Captain, there has been testimony in this case that the steamer *Pennsylvanian*, when traveling at seven knots an hour, going downstream, could, from the moment her engines reversed, stop in approximately one-half mile. That testimony is assuming that the anchor was not used. Assume,

(Testimony of Orwin G. Graham.)

however, that the anchor were used at the time the engines were put in reverse. What would be your opinion as to the distance in which that ship could stop with the anchor being dropped, going seven knots?

A. I would say approximately half the distance.

Q. There has also been testimony in the case that the Pennsylvanian travelling downstream at four knots an hour from the moment that [779] the engines were put in reverse could stop in approximately one-fourth of a mile. What is your opinion as to the distance in which that same ship could stop going four miles an hour if, when the engines were put in reverse, the anchor is also dropped?

A. Well, I would say that she would stop in less than a quarter of a mile, and in an emergency of that kind where a ship was travelling at the rate of four miles an hour, when the headway became slackened on the ship, a person could use both anchors very safely.

Q. Now, if you used both anchors, what effect would using two anchors have as distinguished from one, with regard to slackening the headway of the ship?

A. Well, it would stop her, I would say, with approximately twice the length of the ship.

Q. Now, what danger, if any, is there of losing the anchor in dropping it when the ship is travelling any speed from, say, four to seven knots?

A. There is a possibility of parting a chain at

(Testimony of Orwin G. Graham.)

that speed if the anchor would hook up on something solid, but if it didn't, with, say, fifteen fathoms of chain in the water, the ship would tow the anchor, drag it right along in the bottom.

The Court: How much is a fathom in feet?

A. Six feet.

Mr. Young: I am glad your Honor asked that question. I had forgotten what it was. [780]

The Court: Did he ever drop the anchor when a ship was going seven knots an hour or over?

Mr. Young: Captain, have you ever had the experience of dropping an anchor when the ship was travelling seven knots an hour or over?

A. Yes, sir.

Q. What ship was that?

A. That was the Jaeger Fontaine.

Q. What was her size? Do you remember?

A. Over five hundred feet long. I don't remember just exactly.

Q. Do you remember what her draft was?

A. Twenty-eight feet two, to the best of my knowledge.

Q. At what speed was she travelling when you dropped the anchor?

A. Well, we were going about fifteen and a half knots an hour and a heavy bank of fog shut down approximately, oh, three hundred yards ahead of us, and I stopped and put the ship full astern and backed her for possibly one minute, and then let go of the anchor, and she must have been going

(Testimony of Orwin G. Graham.)

approximately ten knots an hour at the time I let go of the anchor.

Q. And what was the effect of dropping the anchor under those circumstances?

A. She towed the anchor along and brought the ship to a stop and the tide was flooding and brought the ship to a stop—she would have sheared off—kept the ship straight. Understand ships back to port when you back them, and the anchor dropping, the port anchor, kept the ship on her course. [781]

The Court: How long does it take to get the anchor in the water when you give the order to drop it?

A. At that time there was a man on the fore-castle head ready to drop the anchor, and I would say it didn't exceed over a minute or a minute and a half.

Mr. Young: You may cross examine.

Cross Examination

By Mr. Wood:

Q. You were approaching a fog bank at the time, were you?

A. The fog came out from Jim Crow Point and blowed right down over the hill and shut right down on us, but there was indications of fog before that.

Q. How long before that?

A. Oh, I would say twenty-five minutes.

Q. Is that the reason you had the man on the fore-castle head? A. Yes, sir.

Q. It is not customary to keep a carpenter on

(Testimony of Orwin G. Graham.)

the forecastle head going down the Columbia River in clear weather, is it? A. No, sir.

Q. At many places on the Columbia River the channel is just as narrow as it is in the Willamette. Is not that a fact?

A. Well, you can see. You are not coming around on swings like you are at Post Office Bar and places like that.

Q. Will you please answer my question? Are there not many places on the Columbia River where the channel is just as narrow as Post Office Bar?

[782]

A. Yes, sir.

Q. And there are bends, too, are there not?

A. Well, there isn't any bends that correspond with the bend at Post Office Bar where you are coming on a continuous swing for any great distance.

Q. You do not know whether you have ever navigated the Pennsylvanian or not, do you?

A. I can't say positive, but I imagine that I have, because I was American-Hawaiian pilot for a period of three or four years, and I think that I was on nearly all of their boats with the exception of the California. I won't say that I was ever on her. I don't think I ever was.

Q. How long ago is that?

A. Well, now, I can't state. Four or five years. I don't remember just how long it has been since they put their own pilots on. Up to that time why

(Testimony of Orwin G. Graham.)

I was piloting the American-Hawaiian ships for a period of about four years, to the best of my knowledge.

Q. Do you say that it is your requirement that a carpenter or chief mate or somebody should be kept on the forecastle head all the time the vessels are going down the Willamette River?

A. Yes, sir.

Q. What requirement is that?

A. Well, it isn't a requirement; it is a custom, not a requirement. With any large ships. You don't do it with small ships. [783]

Q. The Inspectors do not make any such requirements.

A. No, they do not.

Q. Are you a member of the Columbia River Pilots Association?

A. Yes, sir.

The Court: Were you defendant in a case in this Court titled Errion vs. Graham about three years ago.

A. Yes, sir. Wait a minute. Well, I was a defendant in a case of Errion vs. Graham, but I don't know whether it was in this Court or not.

The Court: Any further questions?

Mr. Wood: No more.

Redirect Examination

By Mr. Young:

Q. You, personally, regard it as advisable for someone to be on the forecastle head who is competent to drop the anchor under orders from the bridge?

A. Yes, sir.

(Testimony of Orwin G. Graham.)

Q. In going down the Willamette River?

A. Yes, sir.

Recross Examination

By Mr. Wood:

Q. Have you ever been Master of an ocean steamer? A. How is that?

Q. Were you ever Master of an ocean steamer?

A. Never was, no. [784]

Q. What are you, a towboat man?

A. I have operated towboats for—well, since 1908 up to the time I went in the Columbia River Pilots, approximately that much. I wasn't—

Mr. Wood: That is all.

The Court: Step down, Captain.

Mr. Young: That is all.

(Witness excused.)

A. T. LOWERY,

was recalled as a witness in rebuttal in behalf of the Libelant, and, having been previously sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. Captain Lowery, what can you say as to whether or not there is any custom on the Willamette or Columbia rivers of a pilot of ocean-going vessels conferring with other officers on the bridge

(Testimony of A. T. Lowery.)

as to the identity of any whistles which the pilot may hear? A. I never heard of it.

Q. Have you in your experience had occasion to confer with other officers on the bridge of any ship you might have been on with regard to what the nature of the whistle was that you might have heard?

[785]

Mr. Wood: I object to that as entirely immaterial.

A. Not to my knowledge.

Mr. Young: Q. Captain, what has been your observation with respect to any custom or practice of having someone on the forecastle head of an ocean-going ship who is competent to drop the anchor at any time while that ship is in the Willamette River?

A. I always asked for a mate or—or for a carpenter to be left on the forecastle head until we clear the Willamette River.

Q. Why do you do that?

A. For somebody there to handle the anchor and drop the anchor.

The Court: This was in the Willamette River?

Mr. Young: Yes, your Honor.

The Court: I was thinking within the city limits.

Mr. Young: It is outside the city limits, but it is within the Willamette River.

Mr. Young: Q. How far is Post Office Bar from the Columbia River? Do you remember?

A. Approximately three miles.

Q. How much?

(Testimony of A. T. Lowery.)

A. Approximately three miles.

Q. Now, Captain, would you, as pilot, rely upon the lookout on the forecastle head, who is, himself, an ordinary seaman, to drop the anchor in the event you found it necessary so to do?

A. No, sir.

Q. And why not? [786]

A. I don't think he is a capable man to handle the anchor.

Q. There has been testimony in this case that the steamer *Pennsylvanian* travelling downstream at seven knots an hour could, from the time her engines were put in reverse, stop in a distance of approximately half a mile. That testimony was assuming that the anchor was not dropped. What would be your opinion as to the stopping distance at seven knots an hour if the anchor were promptly dropped at the time the engines were put full speed astern?

A. Well, as to the *Pennsylvanian*, I couldn't say, but as to other ships that I have handled, some in the class of the *Pennsylvanian*, I would say it would be approximately a half of the distance, if he would use an anchor.

Q. Would you say that would be a principle that would be of general application to ocean-going ships?

A. I have always used it in case of an accident.

Q. Well, I meant, what is the effect of dropping the anchor on what otherwise would be the stopping distance of any ocean-going ship?

(Testimony of A. T. Lowery.)

A. I don't quite understand your question.

The Court: Would it stop quicker?

Mr. Young: Q. Would it stop more quickly?

A. It would.

Q. And is there any general principle that you have discovered as to how much more quickly it would stop using the anchor and [787] not using the anchor?

A. It depends a good deal on how much chains you give your anchor and if you have got an anchor down and your ship is going astern and you got out thirty fathom in the water she would stop approximately in half the distance she would stop without an anchor.

Q. Now, there has been testimony that the Pennsylvanian travelling at four knots an hour downstream could stop from the time her engines were put in reverse in a distance of one-fourth of a mile without the use of anchors. Assuming that the anchor were dropped at the time that the engines were put full speed astern, what would be your opinion as to the stopping distance then, at four knots?

A. The anchor was dropped immediately when the engines was put astern, I would say she would stop approximately in half the distance.

Q. With a competent man on the forecastle head, upon his receipt of the order from the pilot house to drop the anchor, can he proceed promptly in that regard?

(Testimony of A. T. Lowery.)

A. If the proper man was on the forecastle head, yes.

Q. How quickly after the order is given can he carry it into execution?

A. Probably half a minute, as a rule.

Q. What danger, if any, is there in dropping the anchor of an ocean-going vessel when it is travelling at speeds of, say, from [788] four to seven knots an hour?

A. Well, there is danger that it might hook up on something on the bottom and break your chain. Again, your chain may have a twist in it or half a turn in it and break.

Q. Well, in an emergency how much consideration would you give to that circumstance?

A. I wouldn't give it none.

Q. Have you personally had experience in dropping anchors on ships which are travelling at varying rates of speed?

A. I have.

Q. And to what extent have you had that experience?

A. Well, I had Pat Donahue one night coming into Miller's Sands channel. The steering gear let go. She was making about eight knots on flood tide, let go the starboard anchor, wound up giving her thirty fathom in the water, the engines were put full astern at the same time, and stopped her before she hit the bank, a full, loaded oil tanker.

Q. What happened to the anchor?

A. We drug her home when we got the gear fixed up.

(Testimony of A. T. Lowery.)

Q. Have you had other experiences of that nature?

A. Yes. I had the Iowan one time out of the dry dock, taking her down the river. The steering gear went out five times between here and St. Helens, dropped the anchor five different times and kept her from going ashore.

Q. At what speeds was she travelling when you dropped the anchor? [789]

A. Well, she was travelling approximately seven to eight miles.

Q. Did you lose the anchor on any of those occasions? A. No, sir.

Q. Any other experience of that nature?

A. Well, I had the Larry Doheny one night, the steering gear let go on her and I stopped her with the anchors.

Q. What speed was she travelling?

A. Approximately six knots an hour coming upstream.

Q. All of the vessels to which you have just now referred are ocean-going ships?

A. Yes; two of them oil tankers, one of them a freighter.

Q. Captain, what difference, if any, is there in the effect of dropping the starboard anchor as distinguished from the port anchor on the direction of the ship?

A. Well, if you drop the port anchor——

The Court: Why are you going into that?

(Testimony of A. T. Lowery.)

Mr. Young: It has a bearing, your Honor, upon the testimony of Captain Norberg that he couldn't swing the bow of the Pennsylvanian around to port when she was headed to starboard. May the witness answer?

The Court: Yes.

A. Well, when you drop an anchor on a ship and your ship is steady, an anchor will have a tendency, if it is a port anchor, to pull her to port. If it is a starboard anchor she will have a tendency to pull her to starboard. [790]

Q. Is there any difficulty about dropping both anchors in an emergency?

A. Usually you drop them one at a time. You drop one and secure it and then let go the other one.

Mr. Young: That is all.

Cross Examination

By Mr. Wood:

Q. You say if the ship is on a steady course, if you drop the port anchor she will do what?

A. If a ship is on her steady course and you drop your port anchor it will swing the ship to port, to your left.

Q. Suppose she is already on a considerable swing to her right when you drop the port anchor. What then?

A. Well, it would have a tendency to kind of slow her up a little, but I don't know as it would slow her up a great deal if she is going astern.

Q. The chain from the port anchor, if the vessel

(Testimony of A. T. Lowery.)

was swinging to starboard, would pass underneath the vessel's bow, would it not?

A. Yes. Naturally.

Q. And as that vessel's bow was thus retarded by the chain, the vessel would swing more to starboard, would it not?

A. She would keep swinging to starboard——

Q. Her stern would be swinging free to the stern's port, would it not?

A. If you drop the starboard anchor, it pulls the head of the [791] ship to the right.

Q. Yes, and if you drop the port anchor with the vessel already on a starboard swing, she will still keep swinging to starboard, will she not?

A. She will swing some, until she tows that anchor straight with the ship, yes.

Q. If she is already on a swing to starboard and you drop the port anchor and thus retard the motion of her bow but let the stern keep on swinging, her swing is going to be increased by dropping that anchor, is it not?

A. Until she straightens up on the chain, yes, and tows that anchor——

Q. By the time she straightens up with the chain she will be clear across the channel, will she not?

A. It depends on how far she has got to go.

Q. Whether or not you break a chain or lose an anchor depends on several things, does it not? It depends on whether the anchor tails hold or not, for one thing, does it not? A. Yes.

(Testimony of A. T. Lowery.)

Q. It depends on how fast the ship is going for another thing, does it not? A. It does.

Q. In other words, as long as your chain is paying out freely why you probably won't lose your anchor. Is that a fact?

A. Not necessarily, no. [792]

Q. I say you probably won't lose your anchor.

A. You probably wouldn't.

Q. As long as your chain is paying out freely. But sometime or other, if you are going to have any effect out of the anchor at all, you have got to fetch up on that chain, have you not?

A. Put a strain on it with the brake, yes, just like slowing an automobile.

Q. Yes. Now, when you put that strain on it with the brake, that is the time you may lose your anchor, is it not?

A. You may and you may not.

Q. And you do not dare put your strain on that brake until you have paid out considerable fathoms of chain, do you?

A. You usually start to check it, and in a case of an emergency, there, start to check when you get fifteen fathom out.

Q. Ninety feet? A. Ninety feet.

Q. And how much chain have you got out when you have finished checking it?

A. Usually try to hold thirty in the water.

Q. Who is it that requests this man be on the forecastle head on these ships? Is it the pilot, a Columbia River pilot?

(Testimony of A. T. Lowery.)

A. I usually request that myself.

Q. All the time the ship is in the Willamette River?

A. While proceeding downstream in the Willamette River, yes.

Q. Day or night? [793]

A. Just—yes, day or night, yes.

Q. When do you have them go on the forecastle head when you are coming up the river?

A. Usually have them going on the forecastle head coming up the river at Terminal 4.

Q. Why do you make that difference?

A. Because you are coming upstream and it is just more of a habit than anything else, I guess.

Q. There is no requirement of any kind except the opinion of your pilots—

A. That is all.

Q. —that has to put a man on the forecastle head, is it? A. That is all.

Mr. Wood: That is all, I think.

Mr. Young: That is all, I think.

(Witness excused.)

Mr. Young: That is the conclusion of our testimony, your Honor.

Mr. Wood: If your Honor please, I do not think that this matter of the anchors was properly made an issue in the case, either in the pleadings or in their case in chief, and I do not know how it has impressed your Honor, but if your Honor thinks it is

of any importance I think we ought to have the right to put on some expert testimony ourselves.

The Court: Well, I will leave that decision to you, Mr. Wood. [794]

Mr. Wood: Well, I will say I should like to put some on, but I have not got it right here in the court room. I do not think it was rebuttal in any sense.

Mr. Young: If the Court please, may I move to dismiss the witnesses who have been called this morning?

Do I understand that counsel wishes to put on further testimony?

The Court: That is correct. But he is not ready now.

When will you be ready?

Mr. Wood: I do not know, your Honor. I will have to go out and inquire.

The Court: Then we will adjourn Sine Die until I hear from you further.

Mr. Wood: If your Honor would like to, I am perfectly willing to go ahead with the arguments now and put that testimony on later.

The Court: Do you want to go ahead with the argument now, Mr. Young?

Mr. Young: Well, the only difficulty with it, your Honor, is that we may have to argue it again.

The Court: That would be my difficulty, principally.

Mr. Young: I think it would be very unsatisfactory.

The Court: Well, we will proceed with the argument. You might sit inside, or——

Mr. Young: If the Court please, before proceeding with the argument, in view of the question which has arisen between myself [795] and counsel about the state of the pleadings, I am going to ask leave to amend the original libel to conform to the testimony by adding to Article X two additional subdivisions which would be numbered Subdivisions 12 and 14. I am giving opposing counsel a copy of the proposed amendment and a copy to your Honor. Do you care to have me read the additions? They are short.

The Court: Just tell me what they are.

Mr. Young: Subdivision 12 is that it is an additional charge of negligence against the Pennsylvanian that no competent person was immediately available on the forecastle head of the SS. Pennsylvanian to drop the anchors of said vessel in response to command from her bridge; and 13, that no timely, or any, order was given by the officers of the SS. Pennsylvanian for the purpose of stopping or slowing said vessel and thus avoiding said collision.

The Court: Should I allow that amendment, you will have ample time to meet it.

Do you have objection to the amendment on that basis?

Mr. Wood: Well, I make the objection, but I know that your Honor has already overruled the objection because you have admitted the testimony.

The Court: The amendment is permitted.

Mr. Young: It may be understood, then, I take it, your Honor, that the proposed amendment may also be regarded as being [796] incorporated in the answer of Libelant to the cross libel in respect to Article I appearing on page 3 of the answer in the cross libel. Your Honor may recall that in view of the charges made against the Libelant we set up the affirmative defense of negligence on the part of the cross libelant and did so by reference.

The Court: The same ruling.

Mr. Wood: I should like it understood in the record that this allegation in the amendment is denied by us and that our pleadings may be deemed amended to deny it. The allegation I refer to is as follows: "12. No competent person was immediately available on the forecastle head of the SS. Pennsylvanian to drop the anchors of said vessel in response to command from her bridge."

The Court: It is so understood.

Mr. Young: No objection.

The Court: The decision of the Inspectors in this case is excluded. The Pennsylvanian's bell book is admitted, engine room bell book. Attention is called to Chapter 414 of Oregon Laws of 1914 enacted by the recent legislature entitled "Uniform"——

Mr. Young: Pardon me. That is the engineer's bell book your Honor is referring to.

We will withdraw the objection to that.

The Court: It is admitted before you withdraw it.

Mr. Young: I understand so. But the state of the record will show. [797]

The Court: The record will show that, of course. Attention is called to Oregon Laws 414, Oregon Laws 1941, enacted by the recent legislature, entitled "The Uniform Business Records Act," which, I feel has some bearing by analogy.

Mr. Wood's offer of the pilot's statement to the Inspectors I do not recall whether I ruled on or not. It is admitted, subject to the objection. Attention as to that is called to Volume 4 of Wigmore, Section 1122 and following, Third Edition.

What happened to the two logs of the ships? Were they by mutual agreement not offered in the case? The Pennsylvanian—or did the Barry K have a log?

Mr. Young: Yes, and I offered the use of it to opposing counsel.

Mr. Wood: The Barry K had a very meager log. Our log has been available all through the trial and is still available.

The Court: Neither side is offering either log, then.

Mr. Young: That is right.

Mr. Wood: That is correct.

The Court: Shall we take five minutes before we make argument?

Mr. Wood: May I have an exception to your Honor's ruling excluding the decision of the Inspectors?

The Court: Yes, sir.

Mr. Wood: As I understand, you are excluding the decision of the Inspectors in Captain Reed's case. That is the one you are excluding. [798]

The Court: That is the one I mean.

Mr. Wood: What was your ruling on the other one?

The Court: The other one was admitted subject to the objection made by Mr. Young. It is in the record also, as the pilot's statement to the Inspector is in the record, admitted subject to the objection. I may say, because you gentlemen practice admiralty so largely, that I discussed this matter rather fully with Judge Fee before coming to the conclusion that I have in excluding the decision in this case of the Inspectors.

Mr. Wood: One further word about these amendments. Of course, I do not know where they come in the pleadings, but I assume that he alleges we were negligent in not giving any order to drop the anchors, and if that is the allegation, that must be deemed denied on our part.

The Court: Yes.

Mr. Young: I so understand. They follow as additional subdivisions to Article X of the original libel.

The Court: Five minutes.

(Thereupon, following a recess, the matter was argued the remainder of July 23, and July 24, subsequent to which, Court was adjourned until Friday, July 25, 1941, 10:30 A. M.) [799]

Friday, July 25, 1941, at 10:30 o'clock A. M., the following further proceedings were had:

HENRY C. DYER,

recalled as a witness in sur-rebuttal in behalf of the Respondents, having been previously sworn, testified further as follows:

Direct Examination

Mr. Wood: I think your Honor will remember this man's experience as a port captain of the States Steamship Company, Pacific-Atlantic Steamship Company, and Master of steam vessels coming into this river for a number of years past, including the passenger ship General——

Q. What was your passenger ship?

A. Sherman, General Sherman.

Q. Captain Dyer, what is the practice and has been the practice all during your time of keeping the carpenter and the Chief Mate on the forecastle head of a steamer leaving this port bound down the river?

A. Down through the bridges, down under St. Johns Bridge. After that leave the forecastle head and leave a man on lookout.

Q. Is there any practice or has there been any practice of keeping them on the forecastle head until the vessel reached the mouth of the Willamette River?

A. No, sir, not on any ship I have been on.

Q. Would you regard it as good seamanship when vessels are approach- [800] ing each other in

(Testimony of Henry C. Dyer.)

the nighttime in Post Office Bar channel and they are within 800 or a thousand feet of each other, say, or even twelve or fifteen hundred feet, and the danger signal is blown and the ships are approaching each other from some angle, to let go an anchor on the part of the steamship?

A. No, sir, I wouldn't. I would think it a very foolish maneuver under most circumstances, as when you drop your anchor you lose the maneuvering power of your engines principally and especially if you have way on her, the danger of losing the anchor altogether or having the anchor pay out to such an extent that you just swing helplessly at the end of the chain; dropping an anchor in close waters, if you have got any way on her, is usually a matter of desperation. When going ashore you drop your anchor, even at the risk of running your chain out, to have that anchor in deep water to assist you in backing off, in getting out. But in the matter of a collision, I can't think of an occasion where the maneuvering power of your engines wouldn't be superior to what checking power you got out of your anchors, especially with the risk of its taking charge and just running out or carrying away.

Q. What do you mean by "taking charge"?

A. I mean with the brakes not being able to control it.

Q. Is there any danger to the man on the fore-castle head letting go an anchor going at six or seven knots?

(Testimony of Henry C. Dyer.)

A. Yes, I think there would be a very definite danger, if the chain [801] should snap and pieces fly out or pieces of the chain pipe chipped out by the flying chain. I have known that to happen.

Q. You wouldn't regard it then as a practicable operation? A. No, sir.

Mr. Wood: That is all.

Cross Examination

By Mr. Young:

Q. Captain Dyer, how recently have you personally piloted any ocean-going ships down throught the Willamette River?

A. Well, I never—you mean how recently have I been in command of a ship going down? Well, I can't give you the exact date; within the last two years, I should say.

Q. Within the last two years?

A. Yes. In moving a ship from Portland to Vancouver, relieving a Master temporarily for that move, something of that sort.

Q. Then within the last two years you have not had very much opportunity to know what the custom is with regard to who remains on the fore-castle head until the ship reaches the Columbia River; is that right?

A. Well, I think that I would be aware of any such standard practice on our particular ships because it would show up in the overtime.

Q. You are talking about your own ships now?

A. Yes, I am.

(Testimony of Henry C. Dyer.)

Q. You can't speak for ships of any other lines, though, in that regard, can you? [802]

A. No, I have no positive knowledge. I just speak from the vessels of our own line and ships that I have been on.

Q. Then in testifying as to the custom for the carpenter or the Mate or whoever is in charge of the anchors, to leave the forecastle head when the ocean-going boat gets down through the bridges, you are speaking only for your own company?

A. For States Steamship and Pacific-Atlantic, yes, sir.

Q. I see. Who it is that would determine what men should be on the forecastle head at any particular time on a vessel?

A. Well, the Master would.

Q. If the Master wanted to keep the carpenter or the Mate on the forecastle head in the event of an emergency, he would be at liberty to do so, wouldn't he?

A. Oh, yes.

Q. In other words, that is a matter discretionary with the Master; is that right?

A. All matters of maneuvering and so forth are discretionary with the Master. Outside of the laws, there are no set rules by the company.

Q. Now, if the pilot himself wanted to have someone on the forecastle head for emergency purposes until the boat reached the Columbia River or even farther, he would be at liberty to make that request, wouldn't he?

A. Make that request, yes. Then if the Master

(Testimony of Henry C. Dyer.)

considered the pilot's request reasonable, I am sure he would grant it. [803]

Q. Then there may be some difference among the various pilots in their practices in that regard; would that be true?

A. I don't quite understand.

Q. There may be some difference in the manner in which any particular pilot operates the vessel with regard to his desire that there be someone on the forecastle head? A. Oh, yes.

Q. Isn't it a fact, Captain Dyer, that if a vessel is in motion and the anchor is dropped, that dropping the anchor will tend to retard the forward movement of the vessel?

A. Yes, but it will also tend to—it doesn't directly check; it stops the direction in which you are going. Supposing a vessel is going along and you manage to drop fifteen fathoms of chain, you might, by keeping going ahead, steer her, but if the anchor takes aholt, then she will sheer one way or another; you lose your maneuvering power.

Q. But so far as the forward motion of the vessel is concerned, it will slow it up, won't it?

A. Yes, undoubtedly.

Q. If you, in your judgment, felt that it was advisable to drop an anchor in an emergency, you wouldn't worry too much about the danger of possibly losing that anchor, would you Captain?

A. Oh, yes, you have to figure that. You might run into a position where your anchor would be

(Testimony of Henry C. Dyer.)

still more necessary. You will hold your anchor to try to get the way off the vessel. [804]

Q. Well, the value of the anchor compared with damage that might arise from the collision would be very slight, wouldn't it?

A. Well, yes, if you felt that you were going to get any direct advantage from dropping your anchor, why—to avoid collision, that would definitely be the thing to do.

Mr. Young: That is all.

Redirect Examination

By Mr. Wood:

Q. When you speak of not wanting to lose your anchor you are not thinking of the value of it but the fact that to get any value out of the anchor you have to keep ahold of it?

Mr. Young: That is objected to.

The Court: You may answer.

Mr. Wood: Q. Is that what you mean, Captain? A. Yes.

Q. To get any value out of your anchor you have to keep it on the end of the chain, don't you?

A. Once your anchor is lost, it is of no value to you.

Q. How many ships, until you sold some recently, did the combined fleet of the States Steamship Company and the Pacific-Atlantic Steamship Company and California-Eastern lines have?

A. When I first came ashore four years ago, they had twenty-four.

(Testimony of Henry C. Dyer.)

Q. And they were all under your supervision?

A. Yes.

Q. And the matter of pilots on the Columbia River as employed on [805] your ships was all under your supervision? A. Yes.

Q. And when you were yourself a Master of a ship coming in and out of this river, did you employ Columbia River Association pilots?

A. Yes.

Q. Did you ever have any of them request you to keep a Chief Officer or carpenter on the fore-castle head after you got through the bridges?

A. Not that I recall.

Mr. Wood: That is all.

Mr. Young: That is all.

(Witness excused.)

EDWARD HARRY WOOD,

produced as a witness in sur-rebuttal in behalf of the Respondents, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wood:

Q. Captain Wood, you were formerly a steamship Master employed by the States Steamship Company, weren't you? A. Yes, sir.

Q. For how many years were you a ship Master for that company?

A. Well, approximately four years.

(Testimony of Edward Harry Wood.)

Q. And before that were you Chief Officer?

[806]

A. Chief Officer, yes, sir, for at least ten years.

Q. For the States Steamship Company?

A. States and the old——

Q. Columbia-Pacific?

A. Columbia-Pacific, yes, sir.

Q. Then for ten years as Chief Officer and four years, did you say, as Master?

A. Yes, practically four years.

Q. Fourteen years you were coming in and out of this river on steamships for those companies, were you?

A. Yes, sir.

Q. And when did you leave their employ?

A. In March, 1937, in the early part of March.

Q. And after you left them, whom were you employed by?

A. The American-Hawaiian Steamship Company.

Q. In what capacity?

A. The relieving officer.

Q. What does "relieving officer" mean?

A. Well, the new agreement, as they call it, called for a relieving officer at night to relieve the regular ship's officers while the ship was in port.

Q. In other words, as relieving officer, would you take the place of chief mate or Master, something like that?

A. No, I would take the place of possibly the chief officer but never the Master. [807]

(Testimony of Edward Harry Wood.)

Q. And as relieving officer would you go down the river with a ship? A. Yes, sir.

Q. How long did you act in that capacity?

A. From March, 1937, until March, 1940.

Q. About three years?

A. Just practically three years, yes, sir.

Q. Then you had a total experience on the Willamette and Columbia rivers either as chief officer or Master of about seventeen years?

A. Approximately that, yes, sir.

Q. Do you hold a Columbia River and Willamette River pilot's license? A. Yes, sir.

Q. Whom are you employed by now?

A. Willamette Iron & Steel.

Q. In what capacity?

A. As rigger foreman.

Q. In doing what ship work?

A. In the conversion work of any new navy transports or the navy transports.

Q. You have supervision of their rigging?

A. Yes, on their ship.

Q. Now, what is the practice and what has always been the practice from your experience about keeping the chief officer and the [808] carpenter on the forecastle head of vessels leaving this port bound for sea?

A. Whenever you would be going down the river, why it has been customary to always take them off when they got through the bridge, the St. Johns bridge.

(Testimony of Edward Harry Wood.)

Q. In your experience as Master for the States Steamship Company, did that company employ Columbia River pilots while you were acting as Master?

A. Yes, sir.

Q. Columbia River Association pilots?

A. Yes, sir.

Q. Did you ever hear any of them request you as Master to keep a Chief Officer or carpenter on the forecastle head after they got through the bridges?

A. No, sir.

Q. Have you, acting as Chief Officer for the American-Hawaiian Steamship Company, as relief officer,—have you ever been asked or ordered to stay on the forecastle head after you got through the bridges?

A. No, sir. Unless there would be a possibility of it being a little hazy.

Q. Thick weather, I know, but I am assuming a clear night.

A. No, sir, I never was.

Q. What would you say as to the advisability of letting go an anchor when you were close in the jaws of an approaching [809] collision?

A. Well, it would depend on the speed and there would be a lot of circumstances where it would get you into serious difficulties, because once that anchor gets down you haven't got the maneuverability of your vessel; she is bound to swing and possibly do more damage.

Mr. Wood: That is all. You may cross examine.

(Testimony of Edward Harry Wood.)

Cross Examination

By Mr. Young:

Q. Captain Wood, why has it been the practice for the American-Hawaiian ships to have the carpenter or the Chief Mate on the forecastle head while going through the harbor in Portland?

A. Oh, there is always a possibility that she could take a sheer or something.

Q. And if she did take a sheer, what would the carpenter or the Chief Mate up on the forecastle head do about it?

A. Well, lots of times we would be going up through the bridge and you would whistle for the bridge and the bridge would give you the danger signal or wouldn't answer your signal with an open signal.

Q. Well, do I understand, then, if some emergency arose when you were in the harbor at Portland, you have the Chief Mate or the carpenter on the forecastle head to drop the anchor, if necessary?

A. Yes, if they couldn't open the bridges you certainly would [S10] have to anchor it.

Q. Well, suppose that there were some imminence of a collision with another ship, apart from the matter of the bridges themselves, might you in the harbor want to drop the anchor to avoid such a collision?

A. That would be up to the Master and the pilot on the bridge; that would be up to their discretion.

Q. Well, you can conceive of circumstances

(Testimony of Edward Harry Wood.)

where they might find it advisable to drop the anchor to avoid a collision, can't you?

A. I didn't just understand that.

Q. Can't you conceive of circumstances where the Master or the pilot on the ship might wish to have the anchor dropped in order to avoid a collision with another ship?

A. Yes, possibly if the ship was backing away from a dock or something like that or if he was out of control.

Q. Ships can get out of control in the lower Willamette as well as in the harbor in Portland, can't they? A. Yes, sir.

Q. And as a matter of fact, it is possible to have collisions down between St. Johns bridge and the mouth of the Willamette, just as well as it is up in the harbor; isn't that true? A. Yes, sir.

Q. When you take the carpenter or the Chief Mate off the forecastle head after getting out of the Portland harbor, you simply take your chances from that time on with regard to the matter [811] of dropping an anchor, don't you?

A. Yes, in a way.

Mr. Young: That is all.

Redirect Examination

By Mr. Wood:

Q. In approaching a bridge, when a steamship approaches any bridge, it is at very slow speed, is it not?

A. Yes, sir, barely steerageway.

Q. Barely steerageway? A. Yes, sir.

Mr. Wood: That is what I thought. That is all.
(Witness excused.) [812]

JOHN NORBERG,

was recalled as a witness in behalf of the Respondents, in sur-rebuttal, and testified further as follows:

Direct Examination

By Mr. Wood:

Q. Captain Norberg, to refresh all our memories, how long has your experience coming in and out of the Willamette and Columbia rivers covered——

Mr. Young: Pardon me, if the Court please; I don't want to be technical about this matter but you must remember that the evidence in this case was all closed except the opportunity given to opposing counsel to put on witnesses who were not available during the trial with respect to this matter of the anchor. Now, Captain Norberg has been here during the entire trial. Of course, it is a matter for your Honor's discretion, but it occurs to me that since the case has been concluded it is rather out of order to call a witness now who was actually here during all of the trial.

The Court: Well, he is putting on all of the anchor testimony at once. He may testify.

Mr. Wood: It was my understanding that we would put all of the anchor testimony in at this time regardless of who the witnesses were.

Q. What is the length of your total experience

(Testimony of John Norberg.)

as Master or pilot in these Willamette and Columbia rivers? [813]

A. Thirty-six, thirty-seven years.

Q. And you have already testified that part of that time you were Master, part of that time you were a pilot for the Luckenbach Steamship Company and now a pilot for the American-Hawaiian steamships?

A. Yes.

Q. Now, all that time what custom or practice has existed about keeping the Master or the carpenter on the forecastle head of the steamship—I mean the Chief Officer and the carpenter on the forecastle head of a steamer leaving Portland and bound for sea?

Mr. Young: That is objected to because the witness has already testified upon this point, your Honor.

The Court: He may answer.

Mr. Wood: Q. What has been the practice?

A. To call the Chief Mate and carpenter off the forecastle head after passing through the bridges.

Q. Has there ever been any practice to keep them on the forecastle head in clear weather till the ship got to the mouth of the Willamette River?

A. No.

Mr. Wood: This witness has, your Honor, it is true testified that he thought it was unnecessary and useless to drop the anchors in such close quarters as they then were, but I will not go into it, but I am not shying away from it. [814]

The Court: I remember his testimony.

(Testimony of John Norberg.)

Mr. Wood: If counsel wants to ask him about that, I invite him to.

The Court: Cross examine, Mr. Young.

Cross Examination

By Mr. Young:

Q. Captain Norberg, you have testified that it is not the practice to have either the Chief Mate or the carpenter on the forecastle head as soon as you pass the bridges. But suppose that you are traveling in thick weather, does that make any difference in your practice?

A. Oh, in thick weather, yes.

Q. That is to say, in thick weather you would keep the carpenter or the Chief Mate on the forecastle head, wouldn't you?

A. Yes.

Q. And why?

A. Because you can't see far enough ahead.

Q. Well, what could the Chief Mate or the carpenter do about it?

A. If he got too close to shore on either side, he could call for the Chief Mate to let go the anchor and he would be assistant to the man in the lookout to warn us in thick weather, when the visibility is poor.

Q. Why would you want to throw out the anchor if you were too close to the shore?

A. Well, that is natural, if you can't sheer off?

[815]

Q. In other words, you put out the anchor if you are running close to shore in order to avoid running into the shore; isn't that it?

(Testimony of John Norberg.)

A. When we can't see far enough, we always drop the anchor. It doesn't make any difference if we are close to shore, in the middle of the river, or any place.

Q. Suppose you are in the fog——

(The last answer was read by the reporter for Mr. Wood.)

Mr. Young: Q. Well, suppose that in the fog a ship suddenly looms up ahead of you, when you are traveling four or five knots an hour, under those circumstances might you want to drop the anchor?

A. It might be such circumstances. It may.

Q. Yes. And the reason why you would do it then would be to retard the headway of the ship, wouldn't it?

A. At that time, when it is that thick we just go at a snail's rate; we don't go fast.

Q. What do you mean by a snail's rate?

A. Go one or two knots an hour, perhaps.

Q. If you are going one or two knots an hour and a ship loomed up ahead of you in the fog and you put out your anchor you probably wouldn't hit her, would you?

A. Well, if she goes that slow, yes, and after you stop close, too, you see about a hundred feet or two hundred feet, you know, that is a different thing.

[816]

Q. Well, if you are traveling, say one or two knots an hour and you saw a ship suddenly loom up ahead of you in the fog, by dropping your anchor

(Testimony of John Norberg.)

you might very well avoid a collision, mightn't you?

A. We may and we may not.

Q. Suppose there isn't any fog and the course of a ship ahead of you is such that you become aware there is a possibility of collision, by dropping your anchor you might then avoid a collision, too, mightn't you?

A. No, I may not. I might make a worse mess out of it than if I run without the anchor.

Q. It would depend upon the circumstances at the time, wouldn't it?

A. It depends on the circumstances at the time being.

Q. The purpose of dropping an anchor when a ship is moving is to stop the ship, isn't it?

A. Not always.

Q. Isn't that one of the reasons for dropping the anchor?

A. If you have got space enough ahead of you; if you haven't, the anchor is no earthly good to you.

Q. Assuming that you have some space ahead of you, you would hope by dropping the anchor to retard the forward movement of the ship, wouldn't you?

A. Well, if we had plenty of space ahead of us, then it might be all right, you know, if we had plenty of space ahead of us [817] and had the way off the ship, take it off, take the speed off; that is sailors' language.

Mr. Wood: Q. You said if you had the way off the ship; is that what you said?

(Testimony of John Norberg.)

A. Yes, the way off her.

Q. In other words, if you had no headway?

A. No headway.

Mr. Young: Q. Captain, just one or two more questions and I am through. If the ship is proceeding forward and you drop the starboard anchor, what is the tendency then with regard to the direction of the ship after that?

A. Just when she takes the weight on the anchor, you know; if you drop the anchor she wouldn't start to swing any place before she takes the heavy weight on the anchor. And then the starboard anchor, she will tend to swing off to the right.

Q. And a port anchor, she will tend to swing off to port?

A. Yes, after she got the weight on the anchor, but not before.

Q. I understand, but the river is comparatively shallow at this point, isn't it? A. No.

Q. Even in the channel there is only thirty-five feet of water, isn't there?

A. That is plenty of water.

Q. How long is your anchor chain?

A. About 120 fathoms. [818]

Q. And six feet to a fathom? A. Yes.

Mr. Young: That is all.

Redirect Examination

By Mr. Wood:

Q. You said if you dropped an anchor in case of an approaching collision, you would be very apt to make a mess of it; that was your phrase?

(Testimony of John Norberg.)

A. Yes.

Q. What do you think would have happened on this night if you had dropped the anchor?

A. I would have run right into the Barry "K", I believe.

Q. Counsel asked you whether in thick weather it was the practice to keep the Chief Officer and the carpenter on the forecastle head.

Mr. Young: If I said both, I didn't mean that; one or the other.

Mr. Wood: It is not the practice to keep the Chief Officer and the carpenter and the lookout all on the forecastle head, is it? A. No; just one.

Q. The Chief Officer or the carpenter, not both?

A. Yes.

Q. That is what you mean? A. Yes. [819]

Mr. Young: That is all.

Mr. Wood: That is all.

(Witness excused.) [820]

L. O. HOSFORD,

recalled as a witness in sur-rebuttal by the Respondents, having been previously sworn, testified as follows:

Direct Examination

By Mr. Wood:

Q. Captain Hosford, you also have stated your experience. What do you say as to whether there is any practice to keep the Chief Officer and the car-

(Testimony of L. O. Hosford.)

penter or either of them on the vessel's forecastle head on a night when visibility is good, going downstream out of Portland after you get below the bridges? What is the practice?

A. Well, in my nine years of experience as pilot and two or three years as mate on ocean-going vessels, it has never been the practice to my knowledge of keeping the mate on the forecastle head after the ship is clear of the bridges, the St. Johns Bridge.

Q. What is the difference in the circumstances or conditions that makes it a practice to keep the chief officer or the carpenter on the forecastle head moving about the harbor to the bridges and not keeping him there after you get below the bridges?

A. Well, in maneuvering a ship in the harbor through the various bridges, there is always a great possibility of the bridges failing to open. The ship is handled or maneuvered at a very slow speed whereby we always figure that possibility of the bridges not being able to open and we can stop the ship with her engines in the event that anything might happen with the engines, with the slow [821] speed of the ship, we could stop her headway with the anchors and avoid hitting the bridges. It is just merely a matter of extra precaution due to the fact that the bridges quite frequently are unable to open and we always have the ships running at a very slow speed where they are under control at all times in those narrow quarters.

Q. Were you in the court room here when Cap-

(Testimony of L. O. Hosford.)

tain or Pilot Lowery testified that he had some experience in letting go an anchor on a steamship at seven knots? A. Yes, sir.

Q. What would be your comment on that?

A. I think it is ridiculous. I don't think it is possible to let go an anchor and hold the anchor of a vessel going seven knots. I don't think in the first place that the compressor would—you would be able to hold the anchor and if you did hold it, it would either carry away the chain or more likely tear something loose, tear the windlass loose from the deck, kill the men on the forecastle head. I don't think it is practical, or I don't think it has ever been done. At least it is not safe and practical. I have never seen it done in my experience.

Q. Do you think that it would have done any good for the *Pennsylvanian* to have dropped an anchor when she and the *Barry K* were approaching so close in Post Office Bar the danger of collision would become obvious?

A. No, sir; I do not think so. I think it would have been very [822] poor judgment.

Q. Why ?

A. In the first place, the two ships at that time were too close together, for even had they got the anchor down and had been able to hold it, to have done any good, and had the anchor held, any good as far as checking the way on the ship, you would have lost the maneuverability of the ship, and she would have been helpless as far as helping herself

(Testimony of L. O. Hosford.)

to maneuver and I don't think that the anchor would have taken hold in the short space of time had they been able to get it out in time to do any good as far as even checking the way of the ship or avoiding the collision.

Mr. Wood: You may cross examine.

Cross Examination

By Mr. Young:

Q. Captain Hosford, you were not on board the *Pennsylvanian*, of course, the night of the accident, were you? A. No, sir.

Q. You have not any personal knowledge of the particular problems that were then involved, have you? A. No, sir.

Q. When you state that it was ridiculous for an anchor to be dropped on a boat going seven knots an hour, do I understand you to say that Captain Lowery in fact did not drop the anchor, or that he was unwise to do it? Which did you mean?

A. I would say he was very unwise to attempt to do it. [823]

Q. You are not attempting to say to the court that in point of fact Captain Lowery did not drop the anchor?

A. No, I wouldn't say that, certainly not.

Q. Now, what speed do the ocean-going ships in the harbor ordinarily travel?

A. Just barely have sternway, which probably may be a knot an hour, not to exceed a knot, or a knot and a half an hour.

(Testimony of L. O. Hosford.)

Q. And when a vessel in the harbor is travelling at a knot or a knot and a half an hour, going at such a slow speed as that, when you throw the engines full speed astern, the effect is rather rapid, is it not, in stopping the ship?

A. On most ships, yes. Some ships vary in manœuvering power, in backing power. That has a lot to do with the ship, and the construction and the type.

Q. In other words, in the harbor, where the ships are travelling at such a slow rate of speed, you have even less need for the anchor than you would have down the river farther where the ships are travelling faster. Is not that true?

A. Well, we never—it has been my policy, and I think the policy of all pilots, to govern the speed of his vessel with relation to the surrounding conditions. After you get clear of the harbor with no bridges and narrow confined spaces, why we consider the channel clear and safe and can let the ship go.

Q. Now, you have used the term “extra precaution” in reference to the matter of having either the carpenter or the mate stationed [824] on the forecastle head to operate the anchors when you are in the harbor. As I understand your testimony, then, this extra precaution is used in the harbor but the extra precaution is not used anywhere else in the river.

A. I wouldn't say that, Mr. Wood. We use every precaution possible.

(Testimony of L. O. Hosford.)

Q. I mean the extra precaution about having someone on the forecastle head to drop the anchor upon order.

A. Yes. Wherever we consider the necessity or the possibility of needing an anchor or in thick weather or conditions like that, why the mate or the carpenter is as a rule on the forecastle head.

Q. Well, where else on the Willamette or Columbia rivers than in the Portland harbor do you regard it as advisable to have someone on the forecastle head to drop the anchor? A. No place.

Q. No place? A. No, sir.

Q. Then what did you mean a few minutes ago when you said that whenever you regard it as advisable you would have someone there?

A. In thick weather, or if we anticipate fog, where we have to bring the vessel to a stop quick and anchor her.

Mr. Young: That is all.

Mr. Wood: That is all, Captain.

(Witness excused.) [825]

JAMES A. HAZELWOOD,

recalled as a witness in sur-rebuttal in behalf of the Respondents, having been previously sworn, testified further as follows:

Direct Examination

By Mr. Wood:

Q. Captain Hazelwood, I have forgotten how

(Testimony of James A. Hazelwood.)

long you have said you have been coming into these rivers as Master of steamships.

A. Yes, sir; since 1926. Before that I was mate.

Q. And how long a time did your experience as mate and Master cover?

A. From '22 until October, '35.

Q. And since '35 have you been familiar with the practices on your own American-Hawaiian ships?

A. I have been up and down the river on several of the ships; yes, sir.

Q. Now, during your experience as chief officer and later Master, what can you say as to this alleged practice of keeping the chief officer and carpenter on the forecastle head of a vessel going downstream?

A. To my knowledge we have never kept the chief officer or anyone on the forecastle head except the lookout after the ship gets through the bridges unless it was foggy weather or hazy.

Q. You have confined your answer to your ships. Did you ever hear of any practice to keep them on, on any other ships?

A. No, sir; I have not, and those things are usually judged by [826] the Master of the ship and all of my experience has been here on the river with the Columbia River pilots, members of the Association, and I have never had a request from one of them to keep a man on the forecastle head other than the lookout at night after the ship got through the bridges.

(Testimony of James A. Hazelwood.)

Q. There has been some testimony just given about dropping an anchor here in the harbor. Have you any comment to make on that?

A. Well, there certainly are occasions that an anchor may be dropped in the harbor. Sometimes when there is a current in the river the anchor is used to turn the ship on. The pilot can say "Hold it at fifteen," or "Hold it at thirty," and you can do it.

Q. Suppose a ship is approaching the bridge, a steamship, and the bridge does not open in time. What is done?

A. In my experience, an anchor is never let go to stop the ship in those instances. You can stop the ship. The anchor is let down to help keep the ship in the middle of the channel. If you put your anchor down, you can keep your engines slow and you can keep your ship heading toward the draw of the bridge.

Q. In other words, the anchor is used to keep the position of the ship rather than to stop the ship?

A. Certainly; in those instances and in a fog. The attorney asked a question about an anchor in the fog. You just don't see a ship in the fog. You hear the ship blowing a whistle and he blows a whistle and you answer him with one. When you get up to that ship you are stopped, and it is one of the things that makes [S27] a man very mad, if he sees a ship in the fog, and if he sees it, some fellow lets go an anchor in front of him. That is more danger

(Testimony of James A. Hazelwood.)

of causing a collision in that instance than anything, because the ships are going so slow when they see one another that they can maneuver around. I have left Portland here and never see anything until we got to Longview in the fog, and we met ships all along.

Q. What harm would it have done to anchor then?

A. Well, if the fellow that let go his anchor, the other fellow may have had a little way on, and when a man drops an anchor he has got no control over his ship any more. He is finished with the ship. When he backs or goes ahead his ship yaws around on the anchor.

Q. What is your opinion as to whether it would have been a proper maneuver for the Pennsylvanian to drop an anchor in this case?

A. In that close quarters, Mr. Wood, going five miles an hour, I can't even think that any man on the forecastle head could have opened that compressor and put it on enough to get that anchor to hold any in the length of time that those two ships came together after it was no question but what there was going to be a collision. In fact, if he had let go of the anchor, when he let it go, he may have let it go on board of the barge or on the Barry K.

Q. What is that?

A. I say when they once sing out to let go the anchor and the [828] man starts to open the com-

(Testimony of James A. Hazelwood.)

pressor, it is almost impossible to withdraw that order.

Q. The order?

A. After the maneuver is once started of opening up that compressor——

Q. Yes.

A. ——the anchor goes. They were so close together at that time, if the anchor did go it may have gone aboard the barge or aboard the Barry K, because that is the place where the Pennsylvanian struck.

Q. Has that ever happened in that case?

A. I was in Buenos Aires, Argentine, when the American Legion let go her anchor and sunk two navy tugs, and this was to prevent the ship from hitting the dock at the time. That is a matter of record.

Mr. Wood: I think that is all.

Cross Examination

By Mr. Young:

Q. On this question as to whether there was any danger of the Pennsylvanian dropping her anchors on the barges of the Barry K, it would, of course, depend upon the point of time at which the order to drop the anchors was given and when it was carried into execution, would it not?

A. That is a fact, but from the testimony that I have heard here of the distance apart that these ships were at the time that it was imminent that a collision was going to be, this man was in [829]

(Testimony of James A. Hazelwood.)

the eyes of the ship, right up in the forecastle head.

Mr. Wood: What man do you mean?

A. Sir?

Mr. Wood: You say this man was up in the eyes of the ship.

A. The lookout man. And if there had been an order given to drop the anchor, by the time he stumbled over what he had to do to get back and go behind the windlass, which he would be looking forward then and get over to the wheel of the compressor and turn it, it would be a matter of thirty seconds, anyway, before he could do this.

Mr. Young: Q. You are talking about the lookout now, are you not? A. Yes.

Q. The lookout is not the man that you ordinarily expect to drop the anchors, is he?

A. I have seen many men on lookout drop anchors in my time. That is not a complicated job that takes any man of experience to do. Any man that can turn a wheel can let go an anchor.

Q. If that is true, why did you not leave the matter of handling the anchors up to the lookout when the steamer *Pennsylvanian* was in the Portland harbor instead of having either the mate or the carpenter there?

A. In Portland harbor, the mate of the ship is kept on the forecastle head as an extra lookout. You are around where you have got lights on both sides of you. You have got small boats with [830] tows, you have got ships backing out of docks, many

(Testimony of James A. Hazelwood.)

things that happen in harbors that do not happen after you get out of the harbor limits, and therefore the chief officer is there as an extra lookout to assist in the navigation of the ship.

Q. Well, if the chief officer or the carpenter had been on the forecastle head at the time of this Pennsylvanian accident, then this time loss of thirty seconds that you refer to would not have been involved at all, would it?

A. No, that wouldn't have been involved. I don't think that was the question either. The question is that it has not been the practice of keeping anyone other than the lookout on the forecastle head except in the thick weather after the ship leaves the harbor limits or passes through the bridge.

Q. You used the phraseology that these things are usually judged by the Master of the ship. What were you referring to when you said that?

A. I mean to say that at the time the lookout—the mate and the carpenter shall leave the forecastle head.

Mr. Wood: You said "lookout." You took that back, did you not? The lookout——

A. I mean the carpenter and chief officer.

Mr. Young: Q. In other words, the decision on the precise time when the carpenter or the mate leaves the forecastle head is up to the Master of the ship, is it not? A. That is right. [831]

Q. And if the Master of the ship thinks it is advisable to keep that individual on the forecastle

(Testimony of James A. Hazelwood.)

head after you get through the bridges and on down to the mouth of the Willamette River or below, he can do so, can he not?

A. Naturally keep him right on there.

Q. All the way down to the mouth of the Columbia?

A. Yes, sir; down to 150 miles from Portland.

Mr. Young: That is all.

Mr. Wood: That is all.

That is everything.

The Court: Are either of you going to use the exhibits in this case within the next week?

Mr. Young: I am not personally, your Honor. I am leaving the city tomorrow morning.

(Witness excused.) [832]

[Title of District Court and Cause.]

Thursday, July 24, 1941, at 3:20 o'clock P. M., at Suite 1310, Yeon Building, Portland, Oregon, there being present Mr. Clarence J. Young, of Proctors for the Libelant, and Mr. Erskine Wood, of Proctors for Respondents, the testimony of Earle B. Vaux was taken in the above entitled cause, pursuant [833] to the stipulation entered into between Proctors present in behalf of the respective parties, as follows:

Mr. Wood: Stipulated that the following testimony of Captain Vaux may be read in evidence at the trial on the question of damages the same as if he were present and testifying in person, subject to such objections as there may be made.

Mr. Young: That is satisfactory.

Mr. Wood: He has already been sworn. He does not have to be sworn again.

Mr. Young: That is right.

EARLE B. VAUX

was thereupon produced as a witness in behalf of Respondents, and, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Wood:

Q. Now, Captain Vaux, after the collision did you examine the damage that had been done to your ship by the collision? A. Yes, sir.

Q. I want you to state in a general way what that damage was.

A. The damage that I saw and remember and also put in a report to the Company's offices at San Francisco the following day [834] consisted of four damaged plates which were at that time believed had to be renewed.

Q. And any frames?

A. There was damage to frames, being out of line.

Q. Where were these plates and frames?

A. I cannot remember just the exact position without referring to my own letter to the Company.

Q. You do not have that now?

A. I have not got it with me, no. It is on file in my office.

(Testimony of Earle B. Vaux.)

Q. I did not mean to have you state exactly what they were.

A. I know it was G. and H. strakes, two on each side.

Q. The damage was forward about the bow, was it?

A. Yes, sir.

Q. You did not prepare the specifications for the repairs or anything like that?

A. No, that is not my duty.

Q. Do you know that there were four plates that have to be renewed?

A. I did know there were four plates that will have to be renewed.

Q. And was there not another plate that had to be faired in place?

A. Faired in place; yes, sir; but not renewed.

Q. Does your vessel have to go on dry dock?

A. It was necessary to dry dock the Pennsylvanian.

Q. As a result of the collision?

A. As a result of the collision, due to the fact there were open holes in the vessel, punctured plates. [835]

Q. Was that dry dock in Portland?

A. It was the Portland dry dock in Portland.

Mr. Wood: That is all.

Cross Examination

By Mr. Young:

Q. When was it that you made your inspection?

A. Directly when the vessel returned to the dock in Portland after the collision.

(Testimony of Earle B. Vaux.)

Q. That would be on February 1, 1941?

A. That would be on February 1, 1941, at about 5 A.M. in the morning when I went into the tanks—that is, the 4-B tank.

Q. The vessel was, of course, in the water at that time? A. Yes, she was.

Q. Did anyone accompany you when you made your inspection?

A. Yes, there were, sir, two others. A Mr. Sholts—I don't recall how he spells his name. He is of the Willamette Iron & Steel. And the assistant to Mr. Sholts at the time. Incidentally, the way into that tank is through a manhole, and it requires someone with not too broad a beam to get down through that manhole.

Q. You referred to G and H strakes as being damaged. A. Yes.

Q. How are those strakes lettered? Where does "A" begin?

A. Number A is the first strake, and then you come right straight down—A, B, C, D, E, F, G, and so forth.

Q. Were G and H strakes above, or below, the water line? [836]

A. Just about at the water line, at that particular time.

Q. That is as the boat lay in the water at that time?

A. When she was not underway those holes in G and H strakes were above water, but as the

(Testimony of Earle B. Vaux.)

vessel was underway and making headway she has what is known as a bone in her teeth—it pushes the water up and would allow the water to come in in those holes.

Q. At the time that she was placed on dry dock, did she have cargo in her?

A. Yes, sir; she did.

Q. How much?

A. I don't recall the figures, Mr. Young. That is figures we can readily obtain.

Q. What tonnage of cargo would she carry when loaded to capacity?

A. When loaded to capacity?

Q. Yes.

A. She would carry better than nine thousand tons.

Mr. Wood: Does this relate to the damages?

Mr. Young: Well, it perhaps does in another aspect of it. I was interested, however, in the amount of cargo that might be on board at the time of the accident, and this was a question simply related to that. I am not pressing the point, however, further.

Q. Except for the letter that you mentioned as having written to your office, you have no memorandum of what the damage was?

A. No accurate memorandum as to actual and correct figures of [837] damage; no, sir.

Mr. Young: That is all.

(Testimony of Earle B. Vaux.)

Redirect Examination

By Mr. Wood:

Q. In fact, you are not attempting, necessarily, to state now all of the damage; you are simply stating what part of the damage you saw?

A. That I can remember at this time, yes, sir, without referring to the letter that I spoke of that is on file on board the vessel and in the Company's office in San Francisco.

Q. Furthermore, it frequently develops after a collision that some damage exists which has escaped the first inspection?

A. That is very true. In fact, the whole damage is not ascertained at that time, but when she is in dry dock the body can be seen, which couldn't be seen, of course, when the vessel is in the water.

Recross Examination

By Mr. Young:

Q. You were not present when Captain Tucker made a survey of the vessel, were you, following the accident?

Mr. Wood: On whose behalf?

Mr. Young: I understood it was jointly on behalf of the Pennsylvanian and Western Transportation.

A. I don't recall. I believe I was in Mr. Wood's office at that time. If I could have the actual time I could tell you—I mean [838] the hour and the day and so forth, I would know.

Mr. Young: That is all.

Mr. Wood: That is all.

(Witness excused.) [839]

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Alva W. Person, certify that Oscar Taylor, who was my assistant in the court reporting business in the year 1941 until the first day of December of that year, and who at that time enlisted in the armed forces of the United States and is now stationed at Fort Knox, Kentucky, reported in stenotypy the oral proceedings had and testimony given upon the trial of the above entitled action heard before the Honorable Claude McColloch, Judge of the above entitled court, beginning July 15, 1941, at 8 o'clock A.M.; that the said Oscar Taylor transcribed certain portions of the testimony [840] adduced upon said hearing for use upon the arguments and briefs shortly following the taking thereof; that thereafter and about the first of September, 1942, Mr. Erskine Wood, of proctors for the American - Hawaiian Steamship Company, Claimant of the *Pennsylvanian*, and Respondent to the original libel, and Cross-Libelant, ordered a transcript of the portion of the testimony and proceedings which had not theretofore been transcribed by Mr. Taylor; that I procured the services of Miss Catherine Mulvey, an experienced stenotype

reporter and who had formerly had experience in transcribing stenotype notes taken by Mr. Taylor, to transcribe that portion of the testimony and proceedings which had not theretofore been transcribed by Mr. Taylor, and said Catherine Mulvey did transcribe said stenotype notes under my direction, personal supervision and assistance; and said transcript so prepared has been by me assembled into two volumes, Volume I consisting of pages numbered 1 to 391, both inclusive, and Volume II consisting of pages numbered 392 to 839, both inclusive, exclusive of this certificate, the pages numbered in typewriting being those transcribed by said Catherine Mulvey and the pages numbered by numbering machine being those transcribed by the said Oscar Taylor personally, as above stated, and to the best of my knowledge and belief said transcript contains a full, true and accurate transcript of the stenotype notes of said Oscar Taylor of said testimony and proceedings. A copy of this certificate is attached to each volume.

Witness my hand at Portland, Oregon, this November 14, 1942.

ALVA W. PERSON

Court Reporter

[Endorsed]: Filed Nov. 14, 1942. [841]

[Endorsed]: No 10316. United States Circuit Court of Appeals for the Ninth Circuit. American-Hawaiian Steamship Company, a corporation, owner of The SS. "Pennsylvanian", her engines, boilers, etc., Appellant, vs. Western Transportation Co., a corporation, owner of the Steamboat "Barry K", etc., and Barges 22 and 24, Appellee, and Western Transportation Co., a corporation, owner of the Steamboat "Barry K", etc., and Barges 22 and 24, Appellant, vs. American-Hawaiian Steamship Company, corporation, owner of The SS. "Pennsylvanian", her engines, boilers, etc., Appellee. Apostles on Appeal. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed November 27, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

AMERICAN-HAWAIIAN STEAMSHIP
COMPANY,

Appellant,

vs.

WESTERN TRANSPORTATION CO.,

Appellee.

and

WESTERN TRANSPORTATION CO.,

Appellant,

vs.

AMERICAN-HAWAIIAN STEAMSHIP
COMPANY,

Appellee.

PENNSYLVANIAN—BARRY K.

STATEMENT OF POINTS AND DESIGNA-
TION OF RECORD (RULE 19, SUB-
DIVISION 6)

The points on which Appellant, American-Hawaiian Steamship Company, intends to rely on this appeal are the same as stated in its Assignments of Error, which it hereby adopts, with this supplemental statement:

POINT

I.

The collision was caused by the "Barry K's" holding, without excuse, to the wrong side of the channel, and obstinately persisting in that course, at full speed, without stopping or reversing her engines, even after she had recognized the danger by blowing danger whistles. She continued so right into the jaws of the collision. This conduct of hers was the real cause of the collision, and the "Barry K" should be held solely at fault.

DESIGNATION OF RECORD

Appellant designates the entire record as necessary for a consideration of this appeal.

ERSKINE WOOD

Proctor for Appellant,
American-Hawaiian Steam-
ship Company.

Service of the Within Statement of Points and Designation of Record, by certified copy, at Portland, Oregon, this 4th day of December, 1942, is hereby admitted.

CLARENCE J. YOUNG

Proctor for Western Trans-
portation Co., Appellee.

[Endorsed]: Filed Dec. 7, 1942.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS AND DESIGNA-
TION OF RECORD UNDER SUBDIVI-
SION 6, RULE 19, BY APPELLEE AND
CROSS-APPELLANT

The points on which appellee and cross-appellant, Western Transportation Company, intends to rely on its cross-appeal herein are the same as those stated in its Assignment of Errors which are incorporated herein by reference.

DESIGNATION OF RECORD

Appellee and cross-appellant hereby designates the entire record herein as necessary for consideration of this appeal.

CLARENCE J. YOUNG

Proctor for Appellee and
Cross-Appellant.

State of Oregon,
County of Multnomah—ss.

Service of the within Statement of Points and Designation of Record under Subdivision 6, Rule 19, by Appellee and Cross-Appellant, by certified copy, at Portland, Oregon, this 7th day of December, 1942, is hereby admitted.

ERSKINE WOOD

Per (Illegible)

Proctor for American-
Hawaiian Steamship Com-
pany, Appellant.

No. 10316

IN THE

**United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

AMERICAN - HAWAIIAN STEAMSHIP COM-
PANY, a corporation, owner of the SS "PENN-
SYLVANIAN," her engines, boilers, etc., 3
Appellant,

v.

WESTERN TRANSPORTATION CO., a corpora-
tion, owner of the Steamboat "BARRY K,"
etc., and Barges 22 and 24,
Appellee,

and

WESTERN TRANSPORTATION CO., a corpora-
tion, owner of the Steamship "BARRY K,"
etc., and Barges 22 and 24,
Appellant,

v.

AMERICAN - HAWAIIAN STEAMSHIP COM-
PANY, a corporation, owner of the SS "PENN-
SYLVANIAN," her engines, boilers, etc.,
Appellee.

**Brief on Behalf of American-Hawaiian Steamship
Company, Appellant, and Appelee, Owner of the
"Pennsylvanian"**

*Upon Appeal from the District Court of the United
States for the District of Oregon.*

ERSKINE WOOD,
WOOD, MATTHIESSEN & WOOD,
1310 Yeon Building,
Portland, Oregon,

*Proctor for American-Hawaiian Steamship
Company, Appellant, and Appellee.*

FILED

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No. 10316

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

AMERICAN - HAWAIIAN STEAMSHIP COM-
PANY, a corporation, owner of the SS "PENN-
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v.

AMERICAN - HAWAIIAN STEAMSHIP COM-
PANY, a corporation, owner of the SS "PENN-
SYLVANIAN," her engines, boilers, etc.,

Appellee.

**Brief on Behalf of American-Hawaiian Steamship
Company, Appellant, and Appellee, Owner of the
"Pennsylvanian"**

*Upon Appeal from the District Court of the United
States for the District of Oregon.*

This is an Admiralty appeal from a decision of
the Honorable Claude McColloch, Judge of the
United States District Court for Oregon.

CONCISE ABSTRACT OR STATEMENT OF CASE

The case arose on a libel and cross-libel to determine liabilities for a collision in the Willamette River between an ocean steamer and a tug and tow. The trial Judge held both vessels at fault, and divided the damages. The question is whether this was error. Each side has appealed, each claiming its own vessel free from fault.

To determine this main question, these subsidiary questions arise:

1. Did the tugboat Barry K violate Article 25 of the Inland Rules, requiring vessels passing in narrow channels to keep to the right in all cases where it is safe and practicable to do so? She admittedly did not keep to the right, claiming it was not safe and practicable to do so, and that a "custom" justified her in going to the left. We, for appellant American-Hawaiian Steamship Company, claim it was perfectly safe and practicable for her to keep to the right, and that she violated the Rule, which no "custom" can possibly override; and that this was a fundamental and proximate cause of the collision. The trial Judge did not pass on this question.

2. Was the Barry K at fault for not stopping or reversing her engines when she recognized danger? We claim that she was. It is admitted that after she recognized danger and signified it with the danger signal, she continued at full speed

ahead until the collision was unavoidable. The trial Judge condemned her for this. We concur. Opposing counsel does not agree.

3. Did the ocean steamer, the Pennsylvanian, fail to stop her engines when the Barry K blew the danger signal? The trial Judge held that she did, and that this contributed to the collision. We contend that this finding of the trial Judge is a misapprehension of the testimony and is not supported by any evidence, even taking the record most unfavorably to the Pennsylvanian. We contend that her engines had already been stopped before the first danger signal, and were reversed at that signal, and that she did everything possible to avoid the collision.

4. Another question is whether the Barry K was negligently navigated, in that her pilot was alone in the pilot-house and her master asleep, and her whole navigation was in charge of this single man, the pilot, without other assistance. We have claimed this as negligence. Opponents deny it. The trial Court did not pass on it.

5. The lights of the Barry K and barges were not in accord with the Regulations. While this indicates a general laxity and disregard on the part of her owners, we do not think it contributed to the collision.

6. It was claimed by the Barry K that the Pennsylvanian should have, at the last minute,

changed her maneuver and gone to the left, and also that she should have dropped anchors. These claims seem to us too extreme to warrant attention.

The foregoing are, we believe, the principal questions involved. They arose from facts shortly to be stated in more detail, and many of which are not in dispute.

But before proceeding to that statement, we should point out that the trial Court's opinion and findings are both of the briefest nature, and left many of the issues undecided. He held only that "The collision was the proximate result of negligent handling of both vessels in that they failed to stop engines when the Barry K blew the first danger signal." R. 55. And he held that this finding made decision of the other questions "unnecessary." See his memorandum opinion, R. 40.

He thus left undecided what we regard as the main issue in the case,—the violation by the Barry K of Article 25 of the Inland Rules. And so this Court approaches that question as an entirely fresh issue, without the benefit of any opinion or finding by the trial Court. That, perhaps, is unimportant; for we suppose the question is rather a conclusion from the facts than a fact itself.

Now to state the circumstances more in detail:

The collision occurred February 1, 1941, at

about 12:55 a. m. in the Willamette River below the City of Portland, on a calm night, in smooth water, with little current. The locality is known as Post Office Bar. The river there is in a long easy curve (well illustrated by the chart in evidence), and is about 1200 feet wide, with a 30-foot dredged ship-channel 800 feet wide. This channel was in earlier days only 250 feet wide, but, with the progress of time and the necessities of commerce, has been widened by the U. S. Engineers, first to a width of 500 feet, and then, in recent years, to a width of 800 feet; and still more recently the depth has been dredged to 35 feet for a width of 700 feet. The 30-foot channel and the 35-foot channel are almost identical, and are shown on the chart by appropriate lines. The *Pennsylvanian*, an ocean steamer 430 feet long over all, and drawing at the time 19 feet, was going down stream. The *Barry K*, a river boat with two barges lashed to her, one in front and one alongside, was coming up stream. Each saw the other about a mile away, or a little less. "Less than a mile," Norberg, R. 470. (Of course, all distances stated are approximate only.) The *Barry K* was going full speed, making about six miles per hour against the slight current which was running down stream at the rate of not over a mile per hour. The *Pennsylvanian* had just rung up her engines to full speed, but had not attained it, and was making about seven knots. Steamers coming down use the Post Office Bar Range and then swing off it to the right. The

Pennsylvanian, proceeding in that manner, had just left the range when she sighted, about half a point off her port bow, the Barry K showing her red side light and two vertical towing lights, indicating a tow alongside. It is not possible for a steamer in the Pennsylvanian's position to tell at that distance which *side* of the slightly curving river the upcoming boat is on. (We suppose she has a right to assume the upcoming boat will take the right-hand side in accordance with the Rule, i.e., the west side.) Soon after sighting the Barry K, the Pennsylvanian received from her a single whistle blast. The distance apart at that time was estimated by both pilots at three-quarters of a mile, but, judging from the comparatively short lapse of time in which subsequent events occurred, may have been closer. This single blast from the Barry K the Pennsylvanian answered with a like single blast, and understood and prepared for a port passing, i.e., to the right, in accordance with Article 25. The Barry K claims that her signal was two blasts, not one, and that she desired a starboard passing in accordance with an alleged long-established "custom" for towboats to come up on the left-hand side, in the shallower water, leaving the main ship channel to the steamer.

Shortly after this exchange of signals, the Barry K showed her green light to the Pennsylvanian. The 'Pennsylvanian's navigators took this to be merely a temporary sheer, as often oc-

curs, and as the distance was still great enough ("at least a quarter of a mile," Vaux, R. 559), ("about a half a mile," Nelson, R. 612) to permit the Barry K to correct this and resume her supposed course to the right, the Pennsylvanian was not alarmed, but did, out of extra precaution, stop her engines. This was at 12:54 (to the nearest minute only) by the Bridge Bell Book. Shortly thereafter the Barry K blew danger whistles, a series of rapid blasts, how many is uncertain. The Barry K claims that these blasts were four and two and four and two, meaning two danger signals, each followed by two blasts for a starboard passing. The Pennsylvanian, on the contrary, says they were not thus separated and defined, but were just a succession of short and rapid blasts, i.e., a danger signal. As soon as these blasts were received, the Pennsylvanian immediately reversed her engines. At this time the Barry K was, of course, still showing her green light and, due to the Pennsylvanian's swing to the right for a port passing, had become about two points on the Pennsylvanian's port bow. When the Pennsylvanian reversed her engines, she blew the required signal of three blasts, and when the Barry K heard this she followed it by reversing her engines and likewise blowing three blasts. It is impossible to make any close estimate of the distance apart the ships were when they reversed their engines, since the witnesses are not sufficiently definite, but it is obvious that they were close enough so that thereafter they were unable

to prevent collision. Both the reversing of the Pennsylvanian's engines, and the subsequent collision, are recorded in the Bridge Bell Book as having occurred at 12:55 a. m. But, with the system of recording to the nearest minute only, it is apparent that as much as 59 seconds could elapse between these two events. Nelson, who actually did the recording, says the interval was about "a half to three-quarters of a minute." R. 616. Captain Vaux thought about 45 seconds. R. 563.

During all the period from the time the Barry K blew her first signal until she finally reversed her engines (which was not until after the Pennsylvanian had reversed hers), the Barry K, although realizing that the Pennsylvanian had either misunderstood or disagreed to her alleged two blasts, kept going ahead at full speed. She kept blowing danger signals, but she never stopped or slackened speed in any manner. She kept right on ahead. Her pilot's excuse is that he was "figuring any moment he" (the Pennsylvanian) "would understand the two whistles, he would swing back into his regular course and proceed on down to my starboard side." R. 123. Same, 127; and that he wanted to get out of the ship channel entirely and into the shallow water on the east side. He did not succeed in doing this. He never got into the shallow water. (See place of collision marked on chart.)

The collision occurred on the eastern edge of the dredged ship channel, leaving approximately

800 feet of deep clear channel through which the ships could have passed port to port in accordance with Article 25 had the Barry K not elected to the contrary. The place of collision is marked on the chart by both pilots, and they are agreed on the location.

The Pennsylvanian's stem struck the starboard quarter of Barge 22, which was being pushed ahead on the nose of the Barry K. Considerable damage was done to that barge and her cargo, and also to the Pennsylvanian, but the damages have been stipulated and agreed, and we are not concerned with them here.

SPECIFICATIONS OF ERRORS

The specifications of errors on which this appellant relies are the same as those stated in its Assignment of Errors, R. 64-66, and in its Statement of Points, R. 902-903. These are that the Court erred in the following particulars:

I

In not holding that prior to and at the time of the collision the "Barry K" and her barges were being negligently navigated on the wrong (left-hand) side of a narrow channel (Willamette River), in violation of Article 25 of the Inland Rules, and that this was a proximate cause of the collision.

II

In not holding that the "Barry K" and her barges were being negligently navigated at the time of the collision, in that the pilot was navigating the boat alone in the pilot house, with the master asleep, and that this proximately contributed to the collision.

III

In not holding that the "Pennsylvanian" was carefully navigated throughout and was free from fault, and in not entering a decree in favor of American-Hawaiian Steamship Company accordingly.

IV

In not holding that when the "Barry K" blew her first danger signal, the engines of the "Pennsylvanian" had already been stopped and were still stopped, and in not holding that they were reversed full speed astern at the time of said danger signal.

V

In holding that "The collision was the proximate result of negligent handling of both vessels in that they failed to stop engines when the 'Barry K' blew the first danger signal." (Findings of Fact.) R. 55.

VI

In holding that the "Pensylvanian" "failed to stop engines when the 'Barry K' blew the first danger signal," R. 55, and in not holding that they were already stopped, and were reversed, at that signal.

VII

In holding that both vessels were to blame, and that it was a case for divided damages.

VIII

In entering the final decree of August 20, 1942, holding both vessels to blame, and apportioning the damages on a basis of mutual fault.

IX

The collision was caused by the "Barry K's" holding, without excuse, to the wrong side of the channel, and obstinately persisting in that course, at full speed, without stopping or reversing her engines, even after she had recognized the danger by blowing danger whistles. She continued so right into the jaws of the collision. This conduct of hers was the real cause of the collision, and the "Barry K" should be held solely at fault. The trial Court erred in not so deciding.

SPECIFICATION OF ASSIGNED ERRORS TO BE RELIED ON

These are the same as just stated, and will be found on pages 64 to 66 and on page 903 of the Record.

ASSIGNMENT OF ERROR I ARGUMENT

We address ourselves first to the proposition that the Barry K coming up the river on the left-hand side, violated the narrow channel rule (Article 25 of the Inland Rules, USCA, Title 33, Chap. 3, Sec. 210), and that this was the primary, real, and fundamental cause of the collision. It is covered by Assignment of Error I, that the Court erred "In not holding that prior to and at the time of the collision the 'Barry K' and her barges were being negligently navigated on the wrong (left-hand) side of a narrow channel (Wilamette River), in violation of Article 25 of the Inland Rules, and that this was a proximate cause of the collision."

In our view, this was the fundamental cause of the collision, beside which all other considerations pale. There is no more important rule of the road than the one here in question,—Keep to the Right. It is a statutory adoption for Inland Waters of the long pre-existing "great rule of the road, 'Keep to the Right,' " as it was called by the District Court in *The Victory*, 63 Fed. 631, 635. (We digress to say that the Victory collision oc-

curred before the statutory Inland Rules were enacted, although the Court's opinion was rendered afterward.)

The rule itself is explicit:

“Article 25. In narrow channels every steam-vessel shall, when it is safe and practicable, keep to that side of the fairway or midchannel which lies on the starboard side of such vessel.”
USCA Title 33, Ch. 3, Sec. 210.

This is “a statutory rule which has long been enforced rigidly.” *Marshall Field & Co. v. United States*, 48 F. (2d) 763, 765. And if pilots adhered to it, there would be far fewer collisions. It is when some pilots of an Association, as here, set themselves up above the law and try to establish a custom, to override a statute of Congress that uncertainty and trouble occur.

A mere statement of the channel conditions where this collision occurred makes the Barry K's violation of the Rule so obvious that it seems to us argument is almost superfluous. Observe the conditions: A river 1200 feet wide. A channel 800 feet wide, and 30 feet deep. No sharp bends. But, instead, a long easy curve. No appreciable current,—less than a mile an hour. A calm night. Only a slight breeze from the east. Only seven miles an hour by Government records. Visibility good. A stern-wheel towboat, (sternwheelers are notoriously the easiest to handle, and in fact are built so for that purpose); powerful to do her

work; and even equipped with "monkey rudders" to render her still more maneuverable; not encumbered by a long tow like log rafts on a tow-line, but, instead, pushing one barge ahead on her nose and having the other lashed alongside, the whole combined tug and tow being only 325 feet long. She was also maneuvering *against* such current as there was. And it is a well-known fact that to maneuver against the current is easier than with it.

When the Barry K says that she could not with safety and practicability keep to the right, she is confronted with these facts:

Large ocean steamers (far less maneuverable than she) *always pass each other at this point port to port, i.e., to the right.* R. 131, 158.

They have always done so, even when the channel in former times was *only 250 feet wide.* R. 220. Could not the Barry K do it, now that the channel is 800 feet wide?

Towboats, meeting each other there, pass on either side as agreed. It is "as liable to be one way as the other." Reed, R. 150. (If a towboat can come up the right-hand side to pass another towboat, it is hard to see why she cannot do the same to pass a steamer.)

The Barry K successfully and without difficulty, encumbered with just such a tow as this, customarily navigates up the Willamette River all

through the harbor of Portland, and through the numerous drawbridges, with their comparatively narrow clearances, one only 100 feet,—all without any trouble; and *keeps to the right*, in so doing. R. 147-148. She even goes on up to Oregon City with her tows, R. 146, ten or twelve miles of a narrow, tortuous channel. Is it credible, then, that she could not keep to the right in a channel 800 feet wide?

On this very night in question she was planning to pick up a third barge in Portland Harbor and proceed up stream with it. So she certainly was not encumbered with a heavy tow.

A mere glance at the chart, with special reference to the point of collision, as marked by both pilots, shows that the *whole channel*, 800 feet wide, would have been clear for the Barry K to pass up on the right-hand side. Certainly, if the Pennsylvanian had kept to her right-hand side (even though not to the extreme degree she did to avoid the collision), and the Barry K had kept to her right-hand side, there would have been *several hundred feet of clear water between them*. Indeed, Pilot Reed of the Barry K had to admit this. He said that *he could have come up on the right-hand side safely and still have left 600 feet of deep water for the Pennsylvanian to come down in*. R. 135-136.

Many of the Barry K's pilot witnesses made substantially the same admissions. Pilot Stayton

said that a river boat with tow could come up the west side (right side) of the channel and meet an ocean steamer coming down and that there would be "plenty of clearance in there all right" if the steamer was "in the center of the channel," R. 203. And that a steamer around 400 feet long should leave "at least 100 feet" between her and the tow. R. 204. (If a steamer, even though "in the center of the channel," still leaves room for a towboat to pass to the right—as this testimony indicates—then it is obvious that if the steamer does her duty, and keeps to the right of the center, the towboat would have still more room.) This same pilot also testified that a towboat coming up the right-hand side would leave 600 to 700 feet of clear channel for the down-coming steamer to pass, and that the passage to port would be perfectly safe. R. 224. And he testified before the Steamboat Inspectors that "There is room enough for an up-coming river boat and a down-going ocean steamer in that channel to pass port to port, providing there is no other ocean steamer in the vicinity." Confronted with this testimony, he said: "Yes, sir, I say so yet." R. 225. And he testified again that an ocean steamer, going down stream, could keep in the center of the channel, and not move over to the right, and there would still be room for the upcoming towboat to pass to the right. R. 226.

Boone, another pilot witness for the Barry K, admitted that if it was sure that the down-coming ship would keep to her own right (as of course

she is in duty bound to do), then the up-coming towboat "would be all right" if she also kept to the right. R. 290.

Indeed, Reed, pilot of the Barry K, himself, in effect, admitted that he had no right to come up the left-hand side, when he testified that when he blew his alleged signal of two blasts it was only a "request" which the Pennsylvanian did not have to accede to; that it was merely an invitation to the Pennsylvanian to make a starboard passage, which the Pennsylvanian did not have to accept, and that if the Pennsylvanian had accepted it, the burden of risk was on the Barry K to keep out of the way by getting into the shoal water, and that the Barry K did not fulfill that obligation. R. 124-125. This testimony can only mean that Reed knew that he could have passed to the right, but he preferred to pass to the left, and elected, for his own convenience, to do so, and took the risk.

Pilot Ackerman, another witness for the Barry K, let out the real reason for towboats coming up the left-hand side, in violation of the rule, when he said that "from old time customs we are in the habit of figuring on them being on the east side of the river, towboats coming up and down." R. 240. In short, though the custom, such as it is, originated back in the time when the channel was only 250 feet wide and the towboats left it to the ocean steamers, and themselves took to the shoal water, they have from "habit" continued

the "custom," though all reason for its existence has long since ceased with the widening of the channel to 800 feet.

And pilot Fowler, another witness for the Barry K, admitted that they did it for reasons of convenience. He said that it is "much more convenient" for the towboats to come up on the left-hand side; R. 437, since the current is "slacker there" and that is a shorter route for the tugs and tows to reach their destination, and is "the same as cutting corners." R. 438. But of course, as the courts have stated many times, "convenience" is no justification for violating the law.

The excuses put forth by the Barry K to try to show that it was not safe and practicable to keep to the right are of the flimsiest. The 10 or 15-mile breeze which she claimed might have set her in toward the right-hand bank, became, by the Government's own records, a gentle 7-mile zephyr. Hardly discernible. Of course, even if it had been 15 miles, it would have amounted to nothing. And the shield against this "breeze," which the Barry K gave as one reason for taking the left-hand side, proved to be only a fringe of willows 20 feet high. (It is curious that if wind against the housing and pilot house of this towboat, were, as claimed, an adverse factor in its navigation, the owners should have materially increased the wind-exposed surface sometime before the accident, by raising the pilot house seven feet and putting on two additional cabins. R. 307-

308.) That demon, the “kick water” from the Pennsylvanian’s propeller, which was supposed to have had a tendency to throw the Barry K in on the right-hand bank, turned out to be, as indeed anyone would know, merely the thrust from the Pennsylvanian’s propellers directly *behind her*, and not in the direction of the Barry K, but deflected *away* from her, by the Pennsylvanian’s right rudder. The same exaggeration appears in regard to the supposed displacement swell of the Pennsylvanian.

The real truth of the matter is that the Barry K’s counsel so well recognized the difficulty of proving that the boats could not have safely passed to the right, that he was forced to rest his case on a very novel and peculiar thesis. He does not deny that there are many times when tugs and tows can safely pass ocean steamers at this point port to port. Indeed, he finds it difficult—in the face of his own witnesses—to claim that the Barry K could not have done so at this time. But he claims that because oftentimes it may be easier and more practicable for tugs and tows to come up on the left-hand side (which we do not admit), therefore a custom has grown up, and that “safety and practicality” depend on this custom being uniform; and so, no matter how safe and practicable it may be to pass port to port in a given instance, nevertheless, the vessels must pass to starboard so as to keep the custom uniform. This, of course, can not be the law. Ves-

sels must be governed by conditions as they exist at the time, and if it is safe and practicable to pass to port at that time, they must do so. The contrary position is so novel that, lest your Honors think I overstate it, I quote what counsel said:

“Mr. Young: If the Court please, yesterday your Honor was inquiring of me with respect to our theory on the matter of custom. I wanted this morning to amplify one of the answers which I made. It is our position that with respect to whether or not *is* (it) was either safe or practicable for river boats to use the west side of the river *that depends not necessarily upon conditions that may exist at any particular moment of time*, but, rather, upon conditions which are changing from time to time and over long periods; that is to say, conditions with respect to the matter of the direction of the wind, its violence and velocity, the amount of current in the stream, stormy weather, day, night, the number of vessels which may be present or about Post Office Bar at the time that any particular river boat or tug is about to pass, and so forth.

Mr. Wood: You mean depends on the circumstances at the time of the passage?

Mr. Young: *No, I am stating exactly the opposite, that it does not necessarily depend upon that.* Conditions at the time of the passage may be peculiarly dangerous at that particular point of time, but the custom upon which we rely and which is built up upon factors of safety and practicality is based upon these changing conditions over periods of time extending back as far as 40 to 45 years ago. Now, in view of the circumstance that the amount of danger which might exist to any particular river boat

with its tow in passing Post Office Bar might vary from time to time. *In the interest of uniformity the custom has grown up toward the end that there will not be chaos in the matter as to which side of the river the river boats may be expected to be upon. In other words, the long series of circumstances based upon factors of safety and of practicality have produced this uniformity in the practice to which I refer.*" R. 691- 692. (Italics ours.)

In short, counsel thinks that because *sometimes* it may not be safe and practicable for tugs and tows to come up on the right (to which we do not accede), therefore, they must *never* come up on the right, but instead, a uniform custom must be adopted to come up on the left, and that safety and practicability depend on the uniformity of the custom, and therefore the custom does not violate Article 25. We submit that this can not be the law. If we must have uniformity (which is desirable), let it be uniformity in observing Article 25, rather than uniformity in observing a custom that violates it.

If Congress had intended to permit navigation on the Columbia and Willamette Rivers to be governed by a custom, as here contended for, it would not have enacted Article 25 of the Inland Rules for those rivers. Instead, it would have expressly omitted Article 25, as it did in the Code governing navigation on the Mississippi. Title 33, Ch. 5. It is the custom on the Mississippi "for the ascending vessel to come up under the points, in order to get the benefit of slack water, while

the descending vessel runs the bends, keeping in or near the middle of the river, in the thread of the stream, to get the benefit of the current." *The Stephen R. Jones*, 27 F. (2d) 208, 209. This is the very custom contended for here by the Barry K. But the fact that in the Mississippi Rules, Article 25 is expressly omitted, so as to permit the custom to operate where applicable, is a clear indication that if Congress had had any such intention with reference to the Columbia and Willamette Rivers, it would have made the same omission. The fact that Article 25 of the Inland Rules is included in the Code for those waters, Title 33, Ch. 3, Sec. 210, is the clearest indication that Congress did not intend to permit such a custom. The truth is that some of the pilots here, just as the pilots did in the *Acilia* case at Baltimore, cited hereafter, have attempted to set themselves up as superior to the law of Congress.

The omission of Article 25 from the Mississippi Rules makes all of the Mississippi decisions inapplicable here. Some of them besides *The Stephen R. Jones* are *The John D. Rockefeller*, 272 Fed. 67, and *The Albert Dumois*, 177 U.S. 240.

Neither are any of the Hell Gate cases in point. Hell Gate, as is well known, and as its name implies, is an especially dangerous piece of water with a very sharp bend and extreme currents, and is governed by a special statute,—the East River Statute.

The cases which hold that no custom can justify a violation of Article 25 are numerous. Some of them, with excerpts from the opinions, follow:

Occidental, Etc. v. Smith, 74 F. 261, where this Court condemned in these words an alleged custom for vessels entering the Golden Gate to take the north or left-hand side:

“We cannot find in the testimony or argument of counsel any attempt to give a reason for the alleged custom, and, if it be true that there is such a custom, it is bad in principle, and contrary to law, and the courts will not recognize it as affording any ground for exempting a vessel from liabilities incurred by disregarding the law.” (Citing the *Victory*.)

The Acilia, 120 F. 455, where the Court condemned an alleged “custom of pilots, going to and from the port of Baltimore, of giving the laden vessel coming down the easternmost side of the channel, where the water is deeper, and of the lighter laden vessel taking the westernmost side, where the water is shallower.” (Page 457.) (Note how similar this is to the excuse offered by the *Barry K.*) The Court condemned this in strong language, too long to quote, and said that,

“It is not to be endured that certain of the pilots shall arbitrarily pursue a course in opposition to the law.” (Page 458.)

★ ★ ★ ★ ★ ★

And,

“I have been for a long time disturbed by observing how little attention is paid by many of these members of the Pilot Association to the

regulations prescribed by Congress, and by the United States supervising inspectors under authority of Congress, for preventing collisions. They seem often to be arbitrary and opinionated in their notions of navigation, and indifferent to the fact that it is the owners of these large and valuable steamships, and not themselves, who have to pay for their neglects." (P. 462.) (Language very apropos to the attitude of those members of the Columbia River Pilots Association who testified for the Barry K in this case.)

The Booth, 127 F. 453:

"There was evidence in this case that it was the custom of tugs with long tows to pass to the east of the main channel in order to keep out of the way of large steamers traversing the main channel (the Barry K's excuse exactly), but, of course, no custom can justify a violation of a United States statute." (Page 455.) (Citing *Occidental Co. v. Smith*, *supra*.)

The Transfer No. 10, 137 F. 666:

"These rules in this case made it the duty of these transports to be on the right-hand side of the center of the stream, and, in point of fact, admittedly they were on the left. The fact that it may be the custom to do this when there is an ebb tide, and that it may be easier to go up on the New York side than on the other side, and that they thereby can go a little faster" (just like the Barry K) "does not alter the fact that any vessel that goes up in that way violates the law and takes the risk, and, if there is any collision, is presumably in fault." (Page 666.)

The Hokendauqua, 270 F. 270:

"The tide is not unduly strong, even at its

topmost strength, barely more than a knot, and no reason appears to me why a variation from the rule should be recognized as a valid custom. * * * In point of fact, I consider it proven that this 'custom' of tows that leave Hammond's Flats bound east to hug the Throgg's Neck buoy is one devised for their own convenience, not based on any necessity of navigation, distinctly not tending to safety, and by no means universal. It is therefore for every reason bad." (Pages 271-272.) All like the Barry K.

The Black Diamond, 273 F. 811:

"The rule made it the duty of the Black Diamond to be on the right-hand side of the center of the stream, and not on the left. The fact that there was a strong ebb tide, and that by custom some navigators took chances by being over on the New York side, so as to go faster does not alter the fact that, when a navigator takes this chance, he violates the law and takes the risk. If a collision occurs, his vessel is presumptively at fault." (Page 813.)

Lehigh C. & Nav. Co. v. Compagnie, Etc., 12 F. (2d) 337:

The Doane blew two blasts to take the left-hand side of a narrow channel, because,

"her tow was so heavy that she had more difficulty in stemming the ebb tide than running, when keeping to the eastward or her own starboard side, than she hoped to encounter on the other side close by the anchorage grounds. Her witnesses assert a custom for tows so embarrassed to do what she wanted to do." * * *

"We do not think the custom proved; but, if it were, it would be bad in law, because com-

pliance therewith would violate positive statutory enactment.” (Pages 337-338.)

Marshall Field & Co. v. United States, 48 F. (2d) 763:

“The exception to the statutory requirement of a port to port passing finds its proper application not in convenience but in *necessity*.” (Pages 765-766.) Our italics.

The Priscilla, 55 F. (2d) 32:

“The *Priscilla* contends that it was the custom for boats going up the river to take the southerly course. But the infringement of article 25 in such a place as this cannot be controlled by any alleged custom. The *Alfred W. Booth* (C.D.) 127 F. 453; *The Georgia* (C.C.A.) 18 F. (2d) 743, 744. In the latter case it was held that navigating the East River on the wrong side in violation of a statute was ‘a fault that *custom* or even *convenience* will not excuse.’ ” (Page 36.)

A. H. Bull S.S. Co. v. Chesapeake S.S. Co., 101 F. (2d) 599:

“While, as stated by the judge below, it seemed to be the custom to violate this rule yet the fact that the rule was more honored in the breach than by the observance does not justify its violation. Custom no matter how long persisted in cannot make dangerous procedure safe.” (Page 601.)

TESTIMONY OF THE PILOTS

There is in this case the usual testimony of pilots on both sides of the question. These men testified as “experts.” It seems to us that their

conflicting testimony really adds little to the case. The width and depth of the channel speak for themselves and make the port passing obvious. But if the testimony of the pilots is to be considered, this should be pointed out: There are two groups of pilots on the river. The Columbia River Pilots Association and the so-called Independent Pilots. They comprise two hostile factions. Pilot Norberg, who was piloting the *Pennsylvanian*, is an Independent pilot. All of the pilots who testified as experts against him are members of the Columbia River Pilots Association. Furthermore, all the towboat men, like Reed of the *Barry K*, while not members of the Association, are members of the same Union to which the Association also belongs—Local 17. R. 787. So that there is a natural affinity between them, as against the Independent Pilots, who belong neither to the Union nor the Association. A further consideration is that all members of the Columbia River Pilots Association are themselves former towboat men. They have learned the channel of the Columbia and Willamette Rivers while serving as mates or captains of towboats, and have later graduated into piloting ocean steamers. Therefore, they are disposed to favor their former brethren of the towboats,—in this case, Reed.

We have said enough now on the *Barry K*'s violation of Article 25, which we think was a fundamental cause of the collision, and proceed to a consideration of another cause, equally fundamental.

SPECIFICATION OF ERROR IX

THE BARRY K's PERSISTENCE IN KEEPING
ON THE LEFT-HAND SIDE AND FAILING TO
STOP OR REVERSE HER ENGINES WHEN SHE
KNEW THAT A DANGEROUS SITUATION
HAD ARISEN

ARGUMENT

It is not necessary to say much on this, because it would be hard to find a case where a vessel had more flagrantly run full speed into a collision. These are the admitted facts taken from the mouth of Pilot Reed himself:

The Barry K, blowing an alleged two blasts, received one in return from the Pennsylvanian, which Reed knew meant that the Barry K's signal had been either misunderstood or disagreed to. R. 113. Reed says that he then blew a danger signal, four blasts, followed by two, repeating his request for a starboard passing. But he did not slow or stop or reverse. He kept full speed ahead, and blew, he says, another signal of four blasts followed by two. He still kept full speed ahead. Asked why he did so, he said that the Pennsylvanian was "coming directly head-on, kept coming, and I thought any moment he would hear my two whistles and pull back into his regular course at that point." R. 127,—this in face of the fact that the Pennsylvanian had blown him one blast indicating a clear intention to keep to the right. Reed still kept on full speed, and did not reverse his engines until *after* the Pennsylvanian had reversed hers and blown Reed the required signal of three blasts to indicate "my engines are going full astern"; which finally brought Reed to his senses, and he himself reversed.

It needs no precedents of decided cases to condemn such conduct as this, and we cite none. Judge McColloch rightly found the Barry K at fault in this particular. We concur, and say no more about it.

ASSIGNMENT OF ERROR II

THE BARRY K WAS BEING NAVIGATED BY HER PILOT ALONE, THE MASTER BEING ASLEEP, AND NO OTHER OFFICER ASSISTING.

The Court erred: "In not holding that the Barry K and her barges were being negligently navigated at the time of the collision, in that the pilot was navigating the boat alone in the pilot house, with the master asleep, and that this proximately contributed to the collision."

We do not claim here that there was insufficient "lookout." The boats saw each other far enough apart to render questions of lookout immaterial. We do claim that to leave the whole responsibility of navigation in a channel such as the Willamette River on a pilot alone, with no officer assisting, is not the exercise of that care which the circumstances require. Contrast the two ships in this instant case. On the Pennsylvanian's bridge were her master, a pilot, and third officer. A helmsman was at the wheel, and a lookout forward. On the Barry K was Pilot Reed alone. He had to observe the approaching Pennsylvanian, the ranges and shore beacons, deter-

mine his course, blow his own whistles, listen for the Pennsylvanian's, and answer them, steer his ship, and ring his own signals to the engine-room. There was nobody to assist him in any of these actions. Nor anyone with whom to consult. The only person near him was the "watchman," Kelly, standing in front of the pilot house, whom he sent to call the crew when the collision seemed imminent.

We think it is not too much to suppose that if Captain Williams had been in the pilot house with Pilot Reed, his judgment would have prevented the collision. The responsibility was too much for Reed alone. We do not claim this as negligence in any degree comparable with the violation of Article 25 and the forging full speed ahead into the collision without ever stopping or reversing; but we do claim it is negligence of lesser degree; and certainly it indicates a general laxity in the navigation of these towboats similar to their laxity in carrying improper lights, and with the laxity of their management in issuing no instructions to their pilots to obey Article 25, even after the Steamboat Inspectors had officially decided in Captain Reed's case that it should be obeyed. R. 837-838.

ASSIGNMENTS OF ERROR III, IV, V, VI, VII, VIII.**R. 65-66**

THE PENNSYLVANIAN WAS WITHOUT FAULT AND THE TRIAL JUDGE ERRED IN HOLDING THAT SHE DID NOT STOP HER ENGINES AT THE FIRST DANGER SIGNAL. SHE HAD ALREADY STOPPED THEM: AND REVERSED THEM AT THE FIRST DANGER SIGNAL.

We now address ourselves generally to the navigation of the Pennsylvanian, and particularly to the Court's error in holding that she did not stop her engines at the first danger signal. We think this is a clear oversight on the trial Judge's part as to what the testimony actually was. These matters are covered by Assignments of Error III, IV, V, VI, VII and VIII, and this argument is addressed to all of them. These assignments are:

The Court erred,

III

"In not holding that the Pennsylvanian was carefully navigated throughout and was free from fault, and in not entering a decree in favor of American-Hawaiian Steamship Company accordingly.

IV

"In not holding that when the Barry K blew her first danger signal, the engines of the Pennsylvanian had already been stopped and were still stopped, and in not holding that they were reversed full speed astern at the time of said danger signal.

V

“In holding that ‘The collision was the proximate result of negligent handling of both vessels in that they failed to stop engines when the Barry K blew the first danger signal.’ (Findings of Fact.) (R. 55.)

VI

“In holding that the Pennsylvanian ‘failed to stop engines when the Barry K blew the first danger signal,’ (R. 55), and in not holding that they were already stopped, and were reversed, at that signal.

VII

“In holding that both vessels were to blame, and that it was a case for divided damages.

VIII

“In entering the final decree of August 20, 1942, holding both vessels to blame, and apportioning the damages on a basis of mutual fault.”

ARGUMENT

The important point is the Judge’s error in holding that the Pennsylvanian did not stop her engines at the first danger signal, and therefore we speak of that first. This is the only fault he found with the Pennsylvanian. See his opinion, R. 40, and his Findings, R. 55.

What confused the trial Judge was a conflict in Pilot Norberg’s testimony. Pilot Norberg was not a good witness. He was not clear and exact,

nor always consistent. But he was perfectly honest. We believe your Honors can judge of these qualities by the reading of his testimony. He got mixed up in his first testimony, and testified erroneously that when he got a "group of blasts" from the Barry K, he "slowed down," "and held my course along the land there and stopped." (The Bell Book showed that the "slow" and "stop" were really one signal. Cf. also to the same effect, Vaux, R. 559-60 and Nelson, R. 614.) This testimony of Norberg's is at R. 475.

At R. 513-514 he again testified erroneously that when he heard this group of blasts from the Barry K, he ordered "either half speed or stop."

"Q. Did you give the orders for half speed or stop at that time?

A. Half speed or stop, I said.

Q. Which did you do?

A. Well, we will call it half speed, then."

(It is apparent from his previous answer that it was "either" half speed or stop, and from his saying that "we will call it half speed," that he was not saying certainly which order he gave, and, in fact, since one followed immediately on the other, did not regard it as of importance.)

At R. 529 he testified that the half speed and stop orders were really the "same signal"; that a "split second" intervened; that both were given at 12:54. And then this testimony occurred:

“Q. Now, at 12:54—

A. Yes.

Q. —why did you stop then; what did you hear from the other ship which caused you to stop?

A. A danger signal.

Q. Was that the first one you heard?

A. Yes.”

All this testimony was really in error, as he had *already* stopped; and at the danger signal he *reversed*. The testimony of Captain Vaux, Third Officer Nelson, and the original report to the U. S. Steamboat Inspectors, Respondent's Exhibit 12, all show it. And when Pilot Norberg refreshed his memory from the original report which he had signed, he corrected this testimony. So, to the extent to which a man who gives mistaken testimony can retract it, this testimony does not exist. But your Honors will observe that not even *this* testimony says that the Pennsylvanian's engines were not *stopped* at the first danger signal. In fact, it says that they *were*. And the trial Judge really snatched out of the air somewhere his finding they were not stopped. We do not know where he got it. It is nowhere in the record.

The real truth is that the Pennsylvanian's engines were stopped as a precaution, when the *Barry K* first showed her green light. This was before any danger signal was blown. Later, when the so-called “first” danger signal was blown, the Pennsylvanian reversed her engines immediately.

The true facts appear from the following:

First: The Report to the U. S. Steamboat Inspectors made jointly by Captain Vaux and Pilot Norberg himself (Respondent's Exhibit 12) says that:

"As we approached closer, the 'Barry K,' which had up to that time been showing her red light, showed her green side light, and shut out the red. She was still far enough away, however, to resume the port to port passage. *Nevertheless, as soon as we saw her green light, we slowed to half speed and stopped, the stop order following immediately on the half speed.* The bridge Bell Book entry for this is at 12:54 A. M., which, however, is only to the nearest minute. Shortly after we had stopped our engines, *the 'Barry K' sounded several short and rapid blasts, understood by us to be the danger signal, and we immediately put our engines full astern* and wheel hard right, and Pilot Norberg sounded three short blasts of the steam whistle to designate engine running full astern." R. 704-705.

This report was made at Portland, Oregon, February 1, 1941, the very day of the accident, when the facts were fresh in the minds of both men who signed it, Captain Vaux and Pilot Norberg. It appears at R. 703-706, and was offered in connection with Pilot Norberg's corrected testimony, and was admitted at R. 861.

Second: Captain Vaux, who was a clear and accurate witness, and, Counsel will not deny, the highest type of shipmaster, testified very clearly

and unequivocally that his ship's engines were stopped when the Barry K's green light first appeared, and were later reversed, immediately on receipt of the Barry K's danger signal. This testimony is as follows:

“Q. All right. Let's get back to the first danger signal you heard from the Barry K after she had shown her green light. When you received that danger signal, what did you do on your ship?

A. I didn't do anything.

Q. I don't mean you yourself; I mean what was done on your ship?

A. The first danger signal the engines had been put to slow and stop previous to that after the green light was visible and when the danger signal came through, it was understood as a danger signal, the engines were put full speed astern. I place that time in reference to the bell book, if they want the exact times.

Q. That is when the green light first appeared, you went half speed?

A. Half speed and then stop, one bell following upon the other. In the bridge bell book the times are kept to the nearest minute. Fractions of minutes are not logged in the bridge bell book; the engine room bell book they are.

Q. Is it your recollection that you put her at half speed and stop as soon as you saw this green light or an appreciable time afterwards?

A. Very shortly after, almost instantly but very shortly after.

Q. And then later you heard the danger signal and then you—what did you do then?

A. After the danger signal?

Q. Yes.

A. The engines were put full speed astern.”
R. 548-549.

Captain Vaux testified to the same facts again, more in detail, R. 559-561. This testimony follows:

“Q. Then when she swung and showed her green light to you, approximately how far apart were the vessels at that time, would you estimate?

A. At least a quarter of a mile, I should judge.

Q. Now, what did you do with the engines of your ship when that green light appeared?

A. The pilot ordered the engines to half speed and then stop, one bell following upon the other.

Q. Well, one bell following upon the other might mean immediately or it might mean with an interval between; which do you mean?

A. A slight interval between.

Q. How much of an interval?

A. A fraction of a minute.

Q. Yes. Now, you have already testified that when that green light first appeared, the vessels were far enough away that you regarded it as safe for her to swing—

The Court: Mr. Wood, pardon me. I suppose some mechanical considerations enter into the time within which they may follow a half speed with a stop?

Mr. Wood: Oh, yes.

The Court: I suppose what he means is that they stopped the engines as quickly as they could.

Mr. Wood: Q. Is that what you mean, Captain? What do you mean when you say half speed and then stop? The Court wants to know whether that means you stopped as quickly as you could or what do you mean?

A. Yes, we stopped as quick as she could. On the telegraphs, your Honor, when they are rung to a slow or to a stop, whatever the bells may be, that telegraph is answered from the engine room and the order is carried out almost instantaneously.

The Court: Q. That isn't what I want light on. A certain situation develops and calls for stopping the engines in the judgment of the pilot; does he stop them or must he first reduce them to half speed?

A. He can stop them immediately, sir.

Mr. Wood: Q. Now, you have already testified, Captain, that when the green light of the Barry K first appeared, you thought it was just some temporary sheer of the vessel and that the ships were far apart, so you thought it was all safe, and she could resume her course; do you remember testifying to that?

A. Yes, sir, I do.

Q. Now, if that is what you thought, why did you half speed and stop?

A. The idea in meeting a vessel is to slow down and in this particular instance it was to give her a chance to right herself without involving a situation that would call for drastic action.

Q. Had you up to that time of your stopping your engines received any danger signal from the Barry K?

A. No, sir.

Q. Well, when did you receive a danger signal from the Barry K, the first one?

A. The first one. She had been showing green for approximately a minute when the first danger signal sounded and at that time the Pennsylvanian's engines were stopped" (he means *already* stopped) "and when it was understood to be a danger signal, the engines were put full astern at that time and a hard right rudder was ordered at the same time.

Q. You say when you received the first danger signal the engines of the Pennsylvanian had already been stopped?

A. Yes, sir.

Q. You are referring to this stop order that you have just been testifying to?

A. That is the one, yes.

Q. In other words, they continued stopped from that stop order until you reversed full speed astern, did they?

A. Yes, sir.

Q. You said that you reversed full speed astern when the danger signal from the Barry K was understood to be a danger signal. There wasn't any doubt about its being a danger signal, was there?

A. There was no doubt whatsoever that it was a danger signal.

Q. In other words, when you got that first danger signal, did you reverse your ship at once?

A. Yes, sir." R. 559-561.

Third: Third Officer Nelson testified to the same effect:

"Q. And what was done with your engines on your ship when the Barry K's green light appeared?

A. The engine was put half ahead" (from full ahead) "and then stopped, almost immediately afterwards." R. 612-613.

* * * * *

"Q. Then at 12:54 your entry shows half ahead, stop?

A. Half ahead and stop.

Q. And those bells followed immediately one on the other, you say?

A. Yes, sir, they were some seconds apart, a few seconds.

* * * * *

Q. Now, at that time had you received any danger signal yet from the Barry K?

A. No, sir.

Q. Now, about how long after that did you give the full speed astern?

A. About a minute.

Q. Yes. And what was the reason for you giving that full speed astern?

A. The Barry K had blown a danger signal.

Q. The first one?

A. The first one, yes, sir.

Q. On receipt of that first danger signal from the Barry K, your engines were put full speed astern; is that what you mean?

A. The Pennsylvanian's engine was put full speed astern and the pilot blew three short blasts of the whistle to indicate that fact.

Q. I say, was that done immediately you heard the danger signal from the Barry K?

A. Immediately.

Q. And because of that danger signal?

A. Because of that, yes, sir." R. 614-615.

Fourth: Pilot Norberg, recalled to the witness stand, and having refreshed his memory from his Report to the Inspectors, corrected his earlier testimony, and testified, as had Vaux and Nelson, that the engines were *stopped* at the *green light* and *reversed* at the *danger signal*. This testimony was as follows: R. 700-701.

"By Mr. Wood:

Q. Captain Norberg, in my going over the transcript of your testimony the other day, I noticed you testified that at the time you received the first danger signal from the Barry K, you put your engines at half speed and stopped and I want to ask you if that testimony is correct?

A. No. I had the engines stopped before that, when she showed the green light and when I saw the danger signal—

Q. What is the correct testimony; what are the facts about that? When you saw the green light of the Barry K first, what did you do with your engines at that time?

A. Half speed and stop.

Q. That is when you saw the green light first?

A. Yes.

Q. Then when you received the first danger signal from the Barry K, what did you do with your engines?

A. Full astern.

Q. Did you make an official report to the United States Inspectors along with Captain Vaux about this collision?

A. Yes, sir.

Q. And since you gave your previous testimony have you refreshed your memory by that report?

A I did.

Q. And does that report state the facts as you have now stated them?

A. Yes.

Q. Have you got that report with you?

A. I have.

Q. I will ask you to produce it.

A. I have got it in my coat pocket there."

(This report was marked "Respondent's Exhibit 12" for identification. R. 703. The Court reserved his ruling on its admission, and later admitted it. R. 861.)

Following this testimony of Norberg's and the reference to the Report, it occurred to the Court to check this testimony against the ship's Bell Book. So the following occurred:

"The Court: What does the bell book show as to the time when the engines were put at half speed and stopped?

Mr. Wood: It is 12:54, half speed, stop.

The Court: Q. So, Captain, the accident occurred to the nearest minute at 12:55?

A. Yes, sir.

Q. And at 12:54 to the nearest minute, which would mean, making all allowances, not more

than two minutes—or less than two minutes before was when you first saw the green light?

A. Just about. Less than two minutes.” R. 706.

The cross-examination and re-direct was as follows:

“By Mr. Young:

Q. Captain, does this bell book show or say anything with reference to your seeing the green light or red light, either one?

A. No, it doesn't show here.

Q. Well, all you see from the bell book is, first of all you see 12:50. What time is that what happened then?

A. That is full speed.

Q. What is that?

A. Full speed.

Q. That was full speed. Now, at 12:54, what next happened?

A. Half speed, stop.

Q. Half speed and stop?

A. Yes.

Q. And those came close together?

A. One bell after the other.

Q. One right after the other. The reason why you did any particular thing at that time does not appear in the bell book, does it?

A. No. It was just a precaution to stop at that time, saw a green light; no apparent danger at that time.

Redirect Examination

By Mr. Wood:

Q. You say there was no danger at that time?

A. At that time there was no danger.

Q. But you stopped out of precaution?

A. Yes.

Mr. Young: That is all.

Mr. Wood: That is all." (R. 707-708.)

The foregoing is all of the testimony about the stopping and reversing of the Pennsylvanian's engines. We have taken pains to quote it all to show this Court two things:

1. That except for Norberg's mistaken testimony, later corrected by the witness himself, the evidence is *unanimous* that the Pennsylvanian *stopped her engines* when the Barry K's green light first appeared, this stopping being executed by a half speed and stop order, the latter following immediately on the first, and really comprising one order.

2. But even if your Honors should ignore all of this evidence of the Official Report; of Vaux; of Nelson; and of Norberg corrected; and should choose to accept as true Norberg's earlier mistaken testimony,—in short, taking the record at its very worst possible for the Pennsylvanian—even so, there is *no testimony* to support the trial Judge's finding that the Pennsylvanian failed to

stop her engines at the first danger signal. For even Norberg's mistaken testimony says that they *were* stopped at that time; although the truth is they had been stopped earlier, and were *reversed* at the danger signal.

The exact words of the trial Judge's finding are that "The collision was the proximate result of negligent handling of *both* vessels in that they failed to *stop* engines when the 'Barry K' blew the first danger signal." R. 55 (*Italics ours.*)

Insofar as the Pennsylvanian is concerned, there is *no testimony to support this finding at all.*

(Parenthetically, we observe that, while it is usual for vessels to stop or reverse on a danger signal, the Rule does not require them to do so. Each case must depend on its circumstances.)

This finding of the trial Judge is the only holding that the Pennsylvanian was to blame. If that finding is reversed, as we think it must be, the Pennsylvanian must go free from any fault for this collision, unless your Honors should find some new fault against her. Therefore, we discuss now briefly her navigation and some of the charges made against her in the libel and contended for by the Barry K's counsel at the trial.

NAVIGATION OF THE PENNSYLVANIAN; AND CHARGES AGAINST HER

Boiled down, these charges are: (Libel, R. 7.)

That she failed to "heed" the "several whistle signals" of the Barry K for a starboard passing;

That she failed to heed the danger signals of the Barry K;

That she "crossed" the Barry K's signal of two blasts by blowing one;

That she failed to go to port to avoid the collision;

And (by amendment to the libel, R. 859), that she failed to drop her anchors to avoid the collision.

We discuss these briefly.

First, that the *Pennsylvanian* failed to heed the "several whistle signals" of the Barry K for a starboard passing. This presupposes, in the first place, that the *Pennsylvanian* received such a signal. As to the first of such signals alleged to have been blown by the Barry K, all of the *Pennsylvanian's* three navigating officers deny it. They say it was one blast, not two; that they confirmed it with each other in accordance with the regular practice on American-Hawaiian vessels, and indeed with good seamanship everywhere, R. 730; and then answered it with one. Their unanimous testimony should certainly be accepted that they

heard it as one blast. Their action in answering with one, and going to the right, is proof positive.

It makes no difference at all that the Barry K *may* have blown two blasts. For if she did, she took the risk of that signal not being heard and understood.

“The vessel which undertakes to proceed contrary to the” (narrow channel) “rule without an assenting signal from the approaching vessel, takes the risk of her signals not being heard and of her not having heard the signals of the other vessel.” *The Gerry*, 161 F. 413, 418.

Cf. *The Black Diamond*, 273 F. 811, “ * * * when a navigator takes this chance” (taking the left-hand side), “he violates the law and takes the risk.” P. 813.

Cf. also *The Transfer No. 10*, 137 F. 666, “* * * any vessel that goes up in that way” (left hand side) “violates the law and takes the risk. * * *”

Indeed, Reed himself admitted that the risk was his when he said that his signal was only a request, and that it was up to him to keep out of the way. R. 124-125.

The vagaries of sound are well known. Reed may have actually blown two short blasts (the rule is that they must be “short”); but so close together as, due to wind or atmospheric conditions, to sound actually as one. It is for this reason that navigators in day-time always try to observe the steam jets of the approaching vessel’s whistle so as to confirm the sound. R. 820, 823.

The very purpose of the rules requiring whistle signals to be *answered* is to show the first-blowing navigator that his signal has been understood. This, and the uncertainty of whistle sounds, are commented on in *The Lake Calvenia*, 279 F. 763, 768, as follows:

“The purpose of requiring one vessel to answer the signals of another is to avoid misunderstanding; to create certainty that the signals given are understood as given. If the giving of a signal implied understanding on the part of the approaching vessel, there would be no occasion for an answering signal. The very fact that the rules are so made that the answering signal must be given, or one indicating that the signal is not understood, is conclusive of the experience of navigators that signals may be frequently misunderstood, and *it is not wholly uncommon, even in the exercise of due care, to hear, in a quick, sharp two-blast signal, but a single blast.* Human nature is fallible, and prudent sailors are often so misled.”

And at page 769: “Her failure to interpret the signal of the Rogers correctly * * * I do not ascribe as a fault on her part.”

So whether the Barry K blew two blasts or not is immaterial. The important thing is: What did the Pennsylvanian *hear*? And that she heard but one is evident from the testimony of all three men on the bridge and from their own conduct in answering with one and going to the right.

But we do not concede that Reed did blow two blasts. He was navigating the boat all alone; he may have been sleepy; he may have been tired;

through monotony of a long job he may have thought he blew two when he only blew one, or as has been suggested, he may have blown them so close together that they sounded like one. We cannot tell. But to say that the Pennsylvanian did not "heed" the signal she *received* is simply going contrary to all the facts.

Now as to the alleged subsequent two blasts. Reed says that he repeated this signal. But it is quite apparent that what he blew was a confused rapid succession of blasts. Nobody seems clear as to how many there were. To the Pennsylvanian they sounded merely as a group of short blasts blown in rapid succession. And since the danger signal is not confined to four blasts, but is by the Rule an indefinite number, "not less than four," they took this to be simply a danger signal emphatically blown, and as soon as they heard it, they reversed. Reed says that he blew them (after receiving the Pennsylvanian's one), 4 and 2 and 4 and 2 (R. 115-116), meaning a danger signal and a request for a starboard passage repeated. His own Captain, Williams, did not hear them this way. R. 166-168. Neither did his witness, Fowler. R. 433. Neither did his witness, Young. R. 417. And even Reed is not too certain about it. For he says: "Well, I was giving two whistles first, the danger whistle and another two whistles, *which I gave several*," etc. R. 122-123. Even the Barry K's counsel had to admit that these whistles were "a little confusing." R. 554. If they were confusing to the counsel who had carefully

studied his case, is it any wonder that they sounded to the navigators of the Pennsylvanian as a succession of rapid blasts, "not less than four"?

The whole 12 of them (if, as claimed, they were 4 and 2 and 4 and 2) could easily have been blown in less than ten seconds. (The writer has tried it by his watch.) And Reed, having, apparently, at first delayed blowing them at all, "figuring any moment" the Pennsylvanian would swing and "proceed on down to my starboard side," R. 123, when he did start blowing danger whistles, did so with the realization that human life was in danger; for he sent his watchman, Kelly, to call his crew. So he probably blew them very rapidly. If, as he claims, he blew 4 and 2 and 4 and 2, it was no fault of the Pennsylvanian's that she did not so distinguish them.

But this is not important. Her failure to distinguish them is *entirely immaterial*. For on receiving those danger blasts, she immediately did the only thing she could do,—reversed her engines. Certainly she could not change the whole maneuver at that time and attempt to go to the left. With an ocean steamer 430 feet long, coming down with the current and already swinging to the right, that would have been impossible. We would not even mention it except that counsel argued for it at the trial.

She did all she could,—she reversed.

As was said in *The Gerry*:

“When they received notice by the two blasts that she did not intend to obey the rule, they immediately reversed full speed astern. This she was bound to do, and it was all she could do.” *The Gerry*, 161 F. 413, 418.

Or, as was said of *The Stavangaren* (the vessel in the *Pennsylvanian*’s position) which had “ported her helm and reversed her engines”:

“She did all that could be expected of her in an efficient endeavor to avoid collision.”

The Bilbster, The Stavangaren, 6 F. (2d) 954, 956.

We have now disposed of the charge that the *Pennsylvanian* failed to “heed” the several whistle signals of the *Barry K* for a starboard passing.

This discussion also disposes of the charges that the *Pennsylvanian* failed to heed the danger signals; that she “crossed” the *Barry K*’s signal; and that she failed to go to port to avoid the collision. An impossible and dangerous maneuver. R. 562; 516-517. Equally impossible would it have been to drop anchors; impossible and dangerous. R. 510-511; 591-592; 597-599; 880-881; 883-884; 889; 864.

This charge about the anchors was an afterthought. The libel was amended at the trial to make it. R. 859. The transparency of this charge may be left to the Record and your Honors’ per-

ceptions. To drop anchors would have been impossible, futile and dangerous, and we do not argue it. Except perhaps to add that, certainly, a ship doesn't have to stand by ready to drop anchors in anticipation that the other ship is going to disobey the Rule of the Road. She has a right to expect obedience. Cf. Norberg's testimony R. 510, " * * * we don't anticipate any trouble that we would have to let go the anchor every turn we make in the river."

"Each of these vessels was entitled to presume that the other would act lawfully; would keep to her own side; if temporarily crowded out of her course, would return to it as soon as possible." *The Victory*, 168 U.S. at p. 426.

We wish to avoid burdening your Honors with too long a brief, and will close.

What could the Pennsylvanian have done to avoid this collision that she did not do? But that does not ask the question right. It is not what could she have done, in the light of after events. She might, for example, have avoided the collision by coming to a stop when she first saw the Barry K, a mile away; but there was no call upon her to do so. Or, for that matter, she might have avoided it by not coming down the river at all. But these are not the questions. The question is: What did she do, or omit doing, as the circumstances unfolded before her, that careful navigators would not have done or omitted?

Nothing. She kept to her own right. She answered the Barry K's whistle promptly. She stopped her engines, as soon as the Barry K's green light appeared, at least a quarter of a mile away (Vaux), a half a mile (Nelson). Having previously heard and answered a single blast from the Barry K, and mindful of the obligations of Article 25, her supposition that the Barry K's green light meant merely a temporary sheer was entirely justified.

"It" (a green light) "would only indicate some slowness in making the turn, or that the ship had perhaps taken a sheer which presently her port helm would overcome. As they watched her, they would every moment be expecting to see indications of the change to port helm. The last thing they would have a right to assume would be that those in charge of the *Acilia* were persistently determined to take the wrong side of the channel." *The Acilia*, 120 F. 455, 459.

The Pennsylvanian would really have been entitled to hold her speed. But instead, out of extra precaution, she stopped her engines. Sure evidence of careful navigation. Then, receiving a danger signal, she immediately reversed, put her rudder hard right, and almost went aground to avoid the collision. She blew the statutory 3 blasts to indicate "my engines are going full astern,"—evidence again of her compliance with every requirement of navigation. It was *she*, not the Barry K, who first reversed.

We do not know what more she could have done.

But certainly, if there *are* any doubts about her conduct, they must be resolved in her favor under the well known rule in the *Victory*. That rule has been applied so many times that your Honors probably know it by heart. But for convenience, we quote it once more:

“As between these vessels, the fault of the *Victory* being obvious and inexcusable, the evidence to establish fault on the part of the *Plymothian* must be clear and convincing in order to make a case for apportionment. The burden of proof is upon each vessel to establish fault on the part of the other.

“The recognized doctrine is thus stated by Mr. Justice Brown in *The Umbria*, 166 U.S. 404, 409: ‘Indeed, so gross was the fault of *The Umbria* in this connection that we should unhesitatingly apply the rule laid down in *The City of New York*, 147 U.S. 72, 85, and the *Ludvig Holberg*, 157 U.S. 60, 71, that any doubts regarding the management of the other vessel, or the contribution of her faults, if any, to the collision, should be resolved in her favor.’” *The Victory*, 168 U.S. 410, at p. 423.

This collision between the *Barry K* and the *Pennsylvanian* is, in many of its features, similar or identical with the *Victory*, the *Acilia*, and the *Bilbster*, all of which we commend to your Honors’ attention.

In the *Bilbster*, 6 F. (2) 954, the Court said, at page 956:

“We conclude that the *Stavangaren* was proceeding on the starboard side of the channel and the *Bilbster* was on her port, heading directly toward her. This called for a port to port passage, and the *Stavangaren* signaled accordingly. But the *Bilbster* kept swinging to the eastward, taking a course that ran her into the collision.”

Passing over some lesser faults of the *Bilbster*, the Court continued:

“Her prime fault, however, was in failing to pass port to port and in shearing from the westerly to the easterly side. This directly brought about the collision, and indeed made it impossible for the *Stavangaren* to get away.

“In determining faults, it is well to start about learning the obligations of the vessels at a time when they first saw or sighted one another. Then the obligations of the vessels with respect to passing was fixed. It was obviously a one-signal situation, and, if the *Bilbster* had been under control, there would have been no difficulty in carrying out the maneuver. The *Stavangaren* thought properly that the *Bilbster* would perform her obligations and pass port to port. She accordingly blew one whistle, and her signals indicated this. She did all that could be expected of her in an efficient endeavor to avoid collision. Port to port passing is a normal and proper navigation. A vessel is not entitled to assume that another vessel will pass her starboard to starboard until two whistles are blown and answered. The *Victory*, 168 U.S. 410, 18 S. Ct. 149, 42 L. Ed. 519; The *Johnson*,

76 U.S. (9 Wall) 146, 19 L. Ed. 610; *The Gerry* (D.C.) 161 F. 413; *The Wm. P. Palmer*, 261 F. 925; *The Florence*, 186 F. 57, 108 C.C.A. 159.

“It was error to oblige the *Stavangaren* to respond in part for the damages which followed from the collision, and the decrees will be modified so as to render the *Bilbster* solely liable.” Page 956.

In the foregoing quotation we particularly direct your Honors’ attention to the statement that:

“In determining faults, it is well to start about learning the obligations of the vessels at a time when they first saw or sighted one another. Then the obligations of the vessels with respect to passing was fixed.”

We do not quote this to inform your Honors of such a well known principle of admiralty law. Your Honors know it too well. We merely adopt it as a succinct statement. It is very apt here. If, when these two vessels first sighted each other, each had blown one whistle and planned to pass to the right, as Article 25 required, there would have been no collision. The reason there was a collision is that the *Barry K* violated that great Rule of the Road,—Keep To The Right. There is no rule more necessary for the courts to enforce. Nor any that more requires certainty in pilots’ obedience to it. Navigators must *know*

that the other fellow is going to obey it. He who does not obey it takes the risk. If collision occurs, the fault is his. The Pennsylvanian obeyed it. The Barry K did not. That was the fundamental cause of this collision.

Upon it followed that other equally dangerous and contributing cause,—Reed's gross negligence in failing to stop or check the speed of his boat in any way; but, instead, with blind stubbornness, continuing full speed ahead into the face of that very danger which his own signals had proclaimed.

Respectfully submitted,

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